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The Prospects for Protecting News Content Under the Digital Millennium Copyright Act

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Abstract

The DMCA was enacted to provide adequate legal safeguards against piracy so that content producers, such as music, software, movie and other media producers, would be incentivized to embrace the digital medium. The antitrafficking provision, in particular, imposes civil and criminal sanctions on technology manufacturers who offer the means to circumvent content producers' digital access controls.

Since its enactment, the DMCA's antitrafficking provisions have been invoked against hackers of digital music, movies and software. This article weighs the prospects for applying the antitrafficking provisions against news aggregators who access password protected digital news content for redistribution. It concludes that while the case law is mixed on specific interpretations of the DMCA's antitrafficking provisions, its protections could be invoked against news aggregators that bypass access controls without a news website's authorization to do so.

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I. INTRODUCTION

In the modern era of digital news, once content leaves the confines of an access-controlled website, traditional legal remedies come too late. The unlimited ability to copy and distribute digital content means the content is irretrievably lost. Traditional copyright law provides little or no safeguard against the appropriation of a newspaper's protected digital content.

In a hard copy world, newspapers had little reason for concern when readers, critics, and commentators re-used content because the newspapers' ability to distribute printed copies was inherently limited. Besides, such re-use was, more often than not, permissible because it promoted important fair use principles. And if commercial entities with a wider reach appropri-

ated newspaper content, traditional copyright law provided newspapers with adequate remedies.[1]

The critics and commentators of today's digital era are vast numbers of bloggers, micro-bloggers, and ordinary social media users. The Internet enables them to distribute appropriated news content on a vast scale at virtually no cost. Important fair use principles are still at stake, but the widespread dissemination of news content endangers the sustained ability of newspapers to produce quality journalism. Their investment in reporting is neither returned through controlled sales to subscribers and advertisers nor recovered through licenses to authorized bloggers and users. Further up the news chain, commercial news aggregators divert audiences from newspaper websites and profit from the resulting traffic through advertising sales.[2]

Can newspapers prevent news aggregators from appropriating online content by using new laws targeting digital piracy? Contrary to popular belief, The Digital Millennium Copyright Act's (DMCA's) anticircumvention provisions[3] protect more than just movies, music, and videogames from piracy. Congress intended the act to protect a wide range of digital content, including news.[4] Nonetheless, scholarly debate to date on the DMCA's anticircumvention provisions has typically featured digital music or videos in its illustrations of the scope and magnitude of the piracy problem.[5] This article is the first to apply the DMCA's anticircumvention provisions to digital news content. Specifically, it assesses the prospects for applying the DMCA's antitrafficking provisions to news aggregators. Part II highlights the tension between the social policies underpinning the antitrafficking provisions, which have the potential to stem the continued decline of the news

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[1] *See* Leonard Downie, Jr. & Michael Shudson, *The Reconstruction Of American Journalism*, 48 COLUM. JOURNALISM REV. 28, 40 (2009) (explaining that current copyright law has not kept up with new issues raised in digital publishing).

[2] *See, e.g.*, Martin C. Langeveld, *Online Payola? Rocking the ASCAP Mode*, 143 ED. & PUB. 10, 10 (2010); Neil Weinstock Netanel, *New Media in Old Bottles? Barron's Contextual First Amendment and Copyright in the Digital Age,* 76 GEO. WASH. L. REV. 952, 978–79 (2008).

[3] 17 U.S.C. §§ 1201–1205 *et seq.* (2000).

[4] *See* S. REP. NO. 105-190, at 2, 8 (1998).

[5] *See generally* Timothy K. Armstrong, *Digital Rights Management and the Process of Fair Use*, 20 HARV. J.L. & TECH. 49, 60–65 (2006) (discussing digital rights management systems for music and video industries); R. Polk Wagner, *Reconsidering the DMCA*, 42 HOUS. L. REV. 1107 (2005) (discussing the DMCA's effect in limiting the development of digital rights management technologies); Randal C. Picker, *From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright*, 70 U. CHI. L. REV. 281, 293 (2003) (discussing the propertization of copyright in the music and video industries).

industry, and the fair use value of news aggregators in disseminating information. Part III describes the historical circumstances leading up to the enactment of the DMCA, its purpose and structure, and the case law interpreting the statute. Particular attention is paid to paragraph (a)(2) within subsection 1201(a), which is the provision that potentially would apply to news aggregators. Part IV assesses whether the simplest of technologies commonly used by news websites, password protection schemes, are protectable under the DMCA. This paper concludes that liability under paragraph (a)(2) could attach to a news aggregator that circumvents a password protection scheme on a news website.

II. Should the Law Protect the News Industry Against News Aggregators?

A. The State of the News Industry

While the many obituaries that have been written about the newspaper industry are premature, virtually every trend for the industry, be it circulation, revenue, or employment, points to an existential crisis. Total paid circulation for U.S. daily newspapers peaked in 1987 at sixty-three million.[6] Circulation in 2009 stood at forty-six million, a twenty-seven percent decline over twenty-two years.[7] Total advertising revenues for newspapers peaked in 2000 at $49 billion but declined to $26 billion in 2010, representing a forty-seven percent reduction over half as much time.[8] Full-time employment in America's newsrooms has declined by twenty-six percent since 2001,[9] bringing their totals to a level last seen in the mid-1970s.[10] Newspapers have struggled to respond. Recognizing the audience-shift from print to online media, newspapers went online as quickly as they

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[6] *Newspaper Circulation Volume*, 1940–2009, 2010 Ed. & Pub. Int'l Y.B., *reprinted in* Newspaper Ass'n of Am., http://www.naa.org/Trends-and-Numbers/Circulation/Newspaper-Circulation-Volume.aspx (last visited November 10, 2011).

[7] *Id.*

[8] *See* Newspaper Ass'n of Am., *Advertising Expenditures*, 1950–2010, http://www.naa.org/Trends-and-Numbers/Advertising-Expenditures/Annual-All-Categories.aspx (last updated March 1, 2011).

[9] *See* Am. Soc'y of Newspaper Eds., *2011 Newsroom Census*, http://asne.org/key_initiatives/diversity/newsroom_census/table_n.aspx (last visited November 10, 2011).

[10] Press Release, American Society of Newspaper Editors, Decline in Newsroom Jobs Slow, (April 11, 2010) (on file with author).

could.[11] They projected their advertising-based business model to an online world and awaited the turnaround in advertising revenues. It never came. In fact, the advertising-driven model for online journalism appears unlikely to be viable at the same pre-digital levels due to a massive oversupply of advertising venues.[12]

At stake in the industry's shift to a digital product is the continued flow of vital information that allows citizens to participate in a healthy civic and social life.[13] The press has always played a pivotal role in American democracy. Even though the decline of newspaper audiences has been matched by an increase in audiences for online and cable news sources, the role of the newspaper as the primary source of independent, local news reporting remains unmatched.[14] Policymakers, observers, and academics have recognized the serious implications for democratic society if newspaper industry declines continue at their current pace. Congress held three hearings in 2009 seeking solutions for the industry.[15] A 2009 *CQ Researcher* report on the future of journalism identified the crux of the concern: "[T]he decline of newspapers will leave citizens without sufficient information for effective self-government . . . and the fragmented nature of the Internet . . . could turn the clock back to [a time when] readers read only publications with which they agreed," leading to a society primarily characterized by divisive partisanship.[16]

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[11] *See* Tom Price, *Future of Journalism*, 19 CQ RESEARCHER 273, 286 (2009).

[12] Online ad revenue for newspapers was $3 billion in 2010, only twelve percent of its total advertising revenue. *See* NEWSPAPER ASS'N OF AM., *supra* note 8. Newspaper ad revenue represented about a tenth of the total market for online advertising, reported to be $26 billion in 2010 by the Interactive Advertising Bureau. INTERACTIVE ADVER. BUREAU, *IAB Internet Advertising Revenue Report: 2010 Full Year Results*, 1, 6 (April 2011), *available at http://www.iab.net/media/file/IAB_Full_year_2010_0413_Final.pdf*; *see also* Paul Farhi, *Build That Pay Wall High*, 31 AM. JOURNALISM REV. 22, 24 (2009); Price, *supra* note 11 at 276.

[13] *See* Downie & Shudson, *supra* note 1, at 40.

[14] *See, e.g.*, Adam Lynn et al., Traditional Content Is Still King As The Source of Local News and Information (May 21, 2008)(conference paper presented to the Int'l Comm. Ass'n) (*available at* http://citation.allacademic.com//meta/p_mla_apa_research_citation/2/3/3/1/4/pages233147/p233147-1.php) (analyzing survey data on media usage compiled by the Federal Communication Commission and a survey of Internet web sites involved in the dissemination of local news).

[15] Bruce W. Sanford et al., *Saving Journalism With Copyright Reform and the Doctrine of Hot News*, 26 COMM. LAW. 8, 8 (2009).

[16] Price, *supra* note 12, at 275.

Some in the news industry have pointed to the rise of news aggregators as the driving force behind the industry's decline.[17] Newspapers charge that news aggregators violate their copyrights and engage in unfair competition by copying and redistributing their stories without authorization or, more importantly, payment.[18] News organizations complain that commercial news aggregators' unauthorized and uncompensated use of their content threatens the newspaper industry's ability to produce quality journalism.[19]

B. The Relationship Between News Aggregators and News Websites

A news aggregator is a website that gathers information from multiple primary sources to display it in a single site.[20] *Google News*,[21] *Yahoo News*,[22] *HuffingtonPost.com*,[23] and *RealClearPolitics.com*[24] are a few examples of commercial news aggregators. News aggregators have been categorized as either feed aggregators or specialty aggregators.[25] Feed aggregators compile news items from multiple sources across a wide variety of topics, while specialty aggregators compile news items from multiple sources focused on a single

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[17] *See, e.g.,* Downie & Shudson, *supra* note 1, at 40.

[18] *See, e.g.,* Jeffrey D. Neuburger, *A Brief History of AP's Battles with News Aggregators*, PBS MEDIASHIFT (May 26, 2009), http://www.pbs.org/mediashift/2009/05/a-brief-history-of-aps-battles-with-news-aggregators146.html; *Editorial: Righting Copyright*, 142 ED. & PUB. 12, 12 (2009).

[19] *See* Maurice E. Stucke & Allen P. Grunes, *Toward a Better Competition Policy for the Media: The Challenges of Developing Antitrust Policies that Support the Media Sector's Unique Role in Our Democracy*, 42 CONN. L. REV. 101, 110–11 (2009).

[20] KIMBERLEY ISBELL, The Rise Of the News Aggregator: Legal Implications And Best Practices 2 (The Berkman Ctr. for Internet & Soc'y at Harv. Univ. ed., 2010).

[21] GOOGLE NEWS located online at http://news.google.com/, describes itself as "a computer-generated news site that aggregates headlines from news sources worldwide, groups similar stories together and displays them according to each reader's personalized interests." GOOGLE NEWS, http://news.google.com/intl/en_us/about_google_news.html (last visited December 5, 2011).

[22] YAHOO NEWS is located online at http://news.yahoo.com/.

[23] HUFFINGTON POST, located online at http://www.huffingtonpost.com/, also creates original content.

[24] REALCLEARPOLITICS, located online at http://www.realclearpolitics.com/, describes its method as follows: "RealClearPolitics features the most comprehensive coverage online by selecting the best pieces, publishing columns from top syndicated authors and producing original content. RealClearPolitics editorial staff writes over 30% of the daily content." REALCLEARPOLITICS.COM, http://www.realclearpolitics.com/about.html (last visited December 5, 2011).

[25] *See* ISBELL, *supra* note 20, at 2–3.

topic, partisan orientation, or geographic location.[26] News aggregators can also be either pure-play aggregators or hybrids. Pure-play aggregators republish or link to source website content, while hybrid aggregators equally combine republishing and linking with original reporting and commentary. *RealClearPolitics.com* is an example of a mostly pure-play, specialty aggregator. The large majority of its headlines, ledes,[27] and full news stories are gathered and displayed from multiple sources for political news.

RealClearPolitics.com derives revenue from advertising based on traffic to its website and mobile applications. For some stories, a reader may click through from a headline to a deep link within the source website, bypassing the source website's home page. In other cases, a reader may read the entire story on *RealClearPolitics.com* without ever visiting the source website. From the source website's perspective, the diversion of audiences from its home page in the case of deep links, or its entire website in the absence of any links, represents lost advertising revenue.[28] Audiences satisfied with *Real ClearPolitics.com's* snippets may never visit the source website at all, further eroding the newspaper's advertising revenues.[29]

Two additional factors are relevant in understanding the relationship between news websites and news aggregators. First is the normative expectation that a newspaper's website content should be free. Ironically, consumer expectations that online news content should be free were set by newspapers themselves. Unlike the motion picture industry, which initially resisted rushing to meet the demand for digital delivery without first ensuring that adequate legal and technological safeguards existed to protect against unauthorized access,[30] the newspaper industry entered the digital delivery business without parallel concerns. Newspaper industry leaders viewed digital delivery as a new distribution channel capable of driving advertising revenue growth.[31] And from the start, consumers and intermediaries, like search engines and news aggregators, were able to access a

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[26] *Id.*

[27] A lede is the introductory section of a news story that is intended to entice the reader to read the full story. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 709 (11th ed. 2003).

[28] Netanel, *supra* note 2, at 979.

[29] *See id.*

[30] For example, the movie industry had pioneered the development of CSS, or the Content Scramble System, to safeguard against unauthorized access of DVDs even before the DMCA was passed. *See* Pamela Samuelson, *DRM {and, or, vs.} the Law*, 46 COMMC'NS OF THE ACM 41, 42–43 (2003).

[31] *See* Downie & Shudson, *supra* note 1, at 32.

newspaper's digital content without being blocked by access control schemes.

Second, news sites may strike licensing deals with news aggregators to recapture lost revenues. Many newspapers have adopted licensing strategies as a solution that seeks to equalize the high cost of news production borne by newspapers with the low cost of distribution enjoyed by news aggregators.[32] The DMCA's penalty provisions may give the newspaper industry powerful leverage in vigorously pursuing a licensing strategy with news aggregators.[33]

To date, no DMCA antitrafficking claims have been brought against news aggregators for circumventing a technological protection measure. The few online copyright infringement lawsuits that have been brought against news aggregators have been settled out of court.[34] At least one such agreement, between GateHouse Media and the parent company of the *Boston Globe*, made reference to antitrafficking boundaries through the use of specific terms of art from the DMCA.[35] The use of these terms of art suggest that the industry is starting to include the DMCA in its store of legal strategies to protect against online infringement.

C. The Social Value of News Aggregators

News aggregation tools like Google News increase citizen access to the "marketplace of ideas."[36] A competitive marketplace of ideas, characterized by a wide number of antagonistic sources and the wide dissemination of

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[32] *See* Rick Edmonds, *The Yahoo Partnership—Big Deal or No Big Deal?*, POYNTER.ORG (Mar. 3, 2011), http://www.poynter.org/uncategorized/79437/the-yahoo-partnership-big-deal-or-no-big-deal/.

[33] *See* 17 U.S.C. §§ 1203, 1204 (2010) (providing civil and criminal penalties for the unauthorized circumvention of technology measures protecting copyrightable works).

[34] *See, e.g.*, Neuberger, *supra* note 18 (discussing the New York Times Co.'s recent settlement with GateHouse Media from copyright litigation over the excerpting of GateHouse content on Boston.com, and the Associated Press's settlement from its copyright infringement lawsuit against the *Moreover* news aggregation service owned by Verisign); ISBELL, *supra* note 20, at 4 (discussing the settlement agreement between Agence France Presse (AFP) and Google News from a lawsuit alleging that Google News had infringed upon AFP copyrightable content).

[35] The settlement agreement between the New York Times Co. and GateHouse Media used the terms "technological protection measure" and "circumvention," both key terms in section 1201 of the DMCA. *See infra* p. 218–219.

[36] *See* Stucke & Grunes, *supra* note 19, at 105–06.

information, plays a central role in our democracy.[37] The truth is most likely to be revealed, and our social, political and cultural health most assured, when more ideas compete.[38] News aggregators, by definition, are not content creators. Nor do they necessarily increase the number or variety of primary sources when they republish or rebroadcast information. They do, however, extend the reach of these sources. More people receive information, which, in turn, spurs greater dialogue and discourse. News aggregators' precise role in creating an engaged and informed electorate has not been conclusively documented. Even so, its pipeline characteristic of increasing the reach of information among the electorate should be a fair use concern.

Studies have shown that media markets characterized by less competition in ideas and low audience feedback are prone to supply-side bias.[39] That is, markets in which one media voice dominates tend to have less objective coverage of political issues.[40] In such markets, a news aggregator's effect of providing greater access to news sources may become vitally important. By increasing consumers' choice of access to the same information, news aggregators may provide a balancing pressure for dominant media to be less biased in their coverage.

News aggregators also represent consumer interests by increasing the variety and reach of information produced by large media corporations among viewers, readers, and listeners. Policies that favor news aggregators arguably protect these consumer interests over the interests of large media corporations.[41] Policies that protect newspapers against commercial news aggregators assume that media corporations are the proper beneficiaries of

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[37] *Id.* at 106.

[38] Accordingly, the Supreme Court has advocated broad constitutional protections for free expression, invalidating state actions that encroach on the widest possible dissemination of information. *See, e.g.*, *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95–96 (1972) (identifying "the continued building of our politics and culture" as a *raison d'etre* for the right to freedom of expression and the basis for invalidating a city ordinance prohibiting school picketing); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (describing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" in rejecting a public official's libel action against a newspaper in the absence of a showing of actual malice).

[39] *See* Stucke & Grunes, *supra* note 19, at 119.

[40] See *id.*

[41] This argument presumes that news aggregators are not large media corporations themselves.

free press protections.[42] But defining commercial news aggregators' use of primary news sources as fair use makes consumers, such as bloggers and other users, the beneficiaries of press freedoms.

On the other hand, an increasing number of specialty aggregators that are highly partisan in their selection of news sources[43] can lead to their online audiences experiencing even narrower, more distorted views of the world.[44] Fueled by the natural human tendency to associate with like-minded people, partisan specialty aggregators contribute to a closed "echo-chamber" effect, in which audiences subscribing to a particular worldview grow more entrenched in their positions and farther apart from those with competing views.[45] Without the tempering effect of neutral news sources, commentators worry that the echo chamber effect increases the rancorous tenor of political discourse and ultimately prevents political compromise and bipartisanship.[46] Moreover, if news aggregators do indeed threaten the primary source's ability to produce quality information,[47] news aggregators may also contribute to the lowering of the level discourse in our democracy by reducing the number of primary sources.

As the newspaper industry redefines its business model for the digital age, one of the tools at its disposal is the Digital Millennium Copyright Act (DMCA). The act was intended to protect digital content producers against the unauthorized use and distribution of their copyrighted content. Newspapers have constitutionally mandated copyright protection for their originally compiled content. Their interest in receiving fair compensation, and indeed survival, must be balanced with the public's interest in the widespread dissemination of information. The news industry's use of the DMCA to enforce restrictions on news aggregator access could be permissible because the public interest served by aggregators is not prevented from being achieved in other ways.

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[42] *See* Stucke & Grunes, *supra* note 19, at 106.

[43] For example, HUFFINGTONPOST.COM is liberal and the DRUDGEREPORT.COM is conservative. Eric Lawrence, John Sides & Henry Farrell, *Self-Segregation or Deliberation? Blog Readership, Participation, and Polarization in American Politics*, 8 PERSP. ON POL. 141, 147 (2010).

[44] Price, *supra* note 11, at 278–79.

[45] *See id.*

[46] *See id.*

[47] *See supra* p. 204–206.

D. The Newspaper Industry Response

Like the movie and music industries in the 1990s, newspapers are now revisiting the idea of digital access controls. Their experiments with establishing protective technology and licensing standards recalls the movie and music industries' experience with similar controls.[48]

In the music and movie industries, digital access control measures have taken the form of encryption schemes,[49] password and handshake routines,[50] pay walls,[51] and flag-based schemes.[52] Newspapers have made preliminary advances in establishing similar access control measures. For example, major news websites condition full access to news content on a user's creation of a password-protected account.[53] A few general interest newspapers, like the *New York Times*, have launched digital pay walls to protect their content.[54]

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[48] *See, e.g.*, Zachary M. Seward, *Who, Really, is The Associated Press Accusing of Copyright Infringement?*, NIEMAN JOURNALISM LAB (Aug. 14, 2009), http://www.niemanlab.org/2009/08/who-really-is-the-associated-press-accusing-of-copyright-infringement/; Samuelson, *supra* note 30, at 43 (noting that digital rights management can be mandated in two ways, a standard-setting process or public legislation).

[49] Digital content protected by an encryption algorithm can only be unlocked by designated or approved devices. For example, at one time Apple prevented users from playing digital music downloaded through its iTunes online music store on any device other than Apple iPods through the use of an encryption-based digital rights management system. Press Release, *Apple Unveils Higher Quality DRM-Free Music on the iTunes Store*, APPLE (Apr. 2, 2007), *available at* http://www.apple.com/pr/library/2007/04/02Apple-Unveils-Higher-Quality-DRM-Free-Music-on-the-iTunes-Store.html.

[50] Handshake routines require a device to transmit a secret handshake code, which when recognized by a remote server, unlocks digital content. For example, a streaming video player like RealPlayer transmits a recognized handshake to a server (RealServer) before video streaming can commence. *See* RealNetworks, Inc. v. Streambox, *Inc.*, No. 2:99CV02070, 2000 WL 127311, *2–3 (W.D. Wash. Jan. 18, 2000)

[51] Pay walls condition access to copyrightable digital content upon payment of a subscription fee. For example, the Thomson Reuters' Westlaw website is guarded by a pay wall that grants users access to content only upon payment of the requisite subscription fee.

[52] Flag-based schemes require a hardware device to respond to digital flags or codes embedded in transmitted data in a prescribed manner. For example, a broadcast flag may require a video receiver to prevent display of unauthorized broadcast content.

[53] *See, e.g.*, THE WASHINGTON POST, http://www.washingtonpost.com.

[54] Arthur Sulzberger, Jr., *Letter to Our Readers: Times Begins Digital Subscriptions*, N.Y. TIMES (Mar. 28, 2011), http://www.nytimes.com/2011/03/28/opinion/l28times.html.

Others are striking deals with device manufacturers, like Apple, to make exclusively licensed content available on their devices, like Apple's iPad.[55]

On the legal front, news organizations are beginning to utilize the anticircumvention protections of the DMCA. The recent case of appropriated online articles from GateHouse Media's "Wicked Local" sites provides an example.[56] GateHouse Media publishes geographically targeted print newspapers for the Waltham, Needham and Newton communities in Massachusetts, along with corresponding online newspapers commonly known as the Wicked Local sites for each community.[57] In 2008, the Globe Newspaper Company ("Globe") started displaying the headlines and ledes from the Wicked Local sites on *Boston.com*, including deep links to the Wicked Local sites.[58] GateHouse Media brought a copyright infringement action against Globe.[59] The suit was eventually settled out of court.[60] While the action was not brought under the DMCA, the settlement agreement outlined broad provisions for ongoing compliance with preventative technological measures, as defined under the DMCA.[61]

Newspaper industry leaders are attempting to build industry-wide support for uniform digital rights management standards. Their efforts parallel the momentum leading up to the agreement between the motion picture and consumer electronics industries to adopt CSS, or Content Scrambling System, as the *de facto* encryption standard for controlling the distribution of home movies on DVDs.[62] For example, in 2006, a coalition of international publishers announced the creation of Automated Content Access Protocol ("ACAP"). ACAP consists of digital code embedded in news websites to instruct search engines on copyrighted content use.[63] In 2009, *Associated*

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[55] *News Corp., Apple Join to Launch iPad-Exclusive News App 'The Daily'*, Fox News (Feb. 2, 2011), http://www.foxnews.com/scitech/2011/02/02/news-corp-apple-prepare-unveil-ipad-news-service-daily/.

[56] Amended Complaint at 2–3, GateHouse Media Mass I, Inc. v. N.Y. Times Co., No. 1:08-12114-WGY, 2009 WL 301807 (D. Mass. Jan. 22, 2009).

[57] *Id.*

[58] *Id.* at 9–10.

[59] *Id.* at 4.

[60] Settlement Agreement, GateHouse Media Mass I, Inc. v. N.Y. Times Co., No. 1:08-12114-WGY(D. Mass. Jan. 25, 2009).

[61] *Id.* at § 1 (memorializing the parties' agreement to implement "commercially reasonable technological solutions" that neither party would "directly or indirectly circumvent").

[62] *See* Samuelson, *supra* note 30, at 43.

[63] Noam Cohen, *Paying for Free Web Information*, N.Y. Times, Dec. 10, 2007, at C4.

Press ("AP") announced the creation of a digital news registry using a microformat known as hNews.[64] A microformat is a type of digital code that allows a news website's content to be tagged with copyright management and other information.[65] Most recently, AP announced the creation of an independent rights clearinghouse to manage the licensing of news content using its digital news registry.[66]

Over the last decade, courts have considered the scope of protection for many of these forms of technological protections under the anticircumvention provisions of the DMCA, mostly in the context of the movie, gaming, and music industries. Whether a court will allow a newspaper to make a DMCA claim against a news aggregator remains to be seen.

III. The Digital Millennium Copyright Act

A. *History and Purpose of the DMCA*

The Digital Millennium Copyright Act (DMCA) was the entertainment industry's response to digital pirates. Entertainment industry fears of mass piracy stemming from the ease and speed of sharing digital files, like MP3s and DVDs, prompted Congress to pass the DMCA.[67]

Congress also desired to update the U.S. copyright regime to suit the demands of a new era.[68] Accordingly, the anticircumvention provisions of

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[64] Press Release, Associated Press, AP to Build News Registry to Protect Content (July 23, 2009) (on file with author).

[65] *See* Langeveld, *supra* note 2, at 10.

[66] Press Release, Associated Press, AP to Pursue Creation of Rights Clearinghouse to Help News Organizations License Digital Content (Oct. 18, 2010) (on file with author). ACAP, hNews, and the AP digital news registry are technologies that clearly respond to section 1202 of the DMCA. Section 1202 prohibits the falsification, alteration, or removal of copyright management information in digital content. 17 U.S.C. §§ 1202(a)– (b) (2006).

[67] *See, e.g.*, H.R. Rep. No. 105-551, pt. 2, at 23 (1998); S. Rep. No. 105-190, at 7 (1998).

[68] H.R. Rep. No. 105-551, pt. 1, at 10 (1998). Another impetus for the DMCA was the need to comply with two international treaties dealing with copyright in a borderless digital era. *See id.* at 11. The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty contain substantively identical anti-circumvention provisions as the DMCA. For instance, Article 11 of the Copyright Treaty provides:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this treaty of the Berne

the DMCA introduced new legal deterrents against unauthorized access of digital works.[69] Its goal was to modernize traditional copyright law, which targeted only the unauthorized copying or distribution of digital files.[70] The DMCA targets individuals or organizations that break digital controls designed to prevent unauthorized access of files. It is an attempt to protect the locks on the proverbial barn door in order to prevent the content horse from leaving in the first place. Traditional copyright still protects the content horse, but now the DMCA also protects the locks on the barn door. Under the DMCA, it is illegal to circumvent "technological measures" intended to "control access" and "protect rights" to copyrighted works in digital form.[71]

The drafters specifically had DVDs encrypted with CSS in mind while drafting section 1201. Movie industry executives saw the enormous potential of CSS-encrypted DVDs, which were launched in the late 1990s. Encrypted DVDs allowed them to retain full control of home movie releases of their movie because only licensed hardware manufacturers could produce the CSS-encrypted DVDs.[72] But movie industry executives also realized that the encryption scheme inevitably would be hacked. They went to Congress for help in securing added legal assurances that made the civil and criminal cost of hacking high.[73] These assurances simply did not exist in then-current copyright law.

The movie industry's worst nightmare came true almost immediately. In 1999, a Norwegian teenager developed "DeCSS." DeCSS allows a user to decrypt the contents of a CSS-encrypted DVD.[74] Combined with advancements in video file compression and peer-to-peer digital distribution, DeCSS effectively circumvented the movie industry's supposedly airtight technol-

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Convention and that restrict acts, in respect of their works, which are not authorized by authors concerned or permitted by law.

WIPO Copyright Treaty, art. 11, Apr. 12, 1997, S. TREATY DOC. NO. 105-17.

[69] 17 U.S.C. §§ 1201–1205 (2006).

[70] *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 435 (2d Cir. 2001).

[71] *See* §§ 1201–1205. The Federal Circuit has said that prior to the passage of Title I of the Digital Millennium Copyright Act in 1998, "a copyright owner would have had no cause of action against anyone who circumvented any sort of technological control, but did not infringe." Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1195–96 (Fed. Cir. 2004).

[72] Armstrong, *supra* note 5, at 61 n.49.

[73] 17 U.S.C. § 1203 creates civil remedies and § 1204 provides criminal sanctions for DMCA violations.

[74] *See* Armstrong, *supra* note 5, at 61 n.49.

ogy scheme.[75] At that point, reprogramming of DVD players to defeat DeCSS was an expensive and impractical solution for an industry deeply invested in the existing system.[76] The movie industry filed one of the first major DMCA lawsuits against a defendant who had posted a link to DeCSS on a website popular with the hacking community. A New York district court ruled in favor of the movie industry in *Universal City Studios, Inc. v. Reimerdes,* and the Second Circuit affirmed the decision in *Universal City Studios, Inc. v. Corley*.[77] These early cases provided a swift kick-off for the rich and checkered series of judicial interpretations of the DMCA's antitrafficking provisions over the next decade.

Although Congress drafted the DMCA with CSS-encrypted DVDs in mind, the anticircumvention protections apply to the wider variety of online content traditionally protected under the Copyright Act.[78] The legislation's aim was to "protect[ ] and create[ ] the legal platform for launching the global digital online marketplace for copyrighted works[,] . . . [including] movies, music, software, and *literary works.*"[79] News articles qualify as "a work protected under this title"[80] as compilations that reflect an author's original expression and that are more than discovered facts alone.[81]

Like prior major amendments to the copyright regime, the DMCA reflects the constitutionally derived balance that Congress sought to strike between the rights of content owners with the rights of viewers, readers, and listeners. But unlike prior amendments, the DMCA regulated devices for the first time.[82] In fact, the DMCA's reach over device regulation led to a

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[75] *See id.*

[76] *See id.*

[77] *See* Universal Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), *aff'd*, 273 F.3d 429 (2d Cir. 2001).

[78] *See* S. REP. NO. 105-190, at 1 (1998).

[79] *Id.* (emphasis added).

[80] 17 U.S.C. § 1201(a)(1)(A) (2006).

[81] 17 U.S.C. § 102(a) (1994) defines copyrightable subject matter to include "original works of authorship fixed in any tangible medium of expression . . . includ[ing] (1) literary works" and §102(b) clarifies that copyright protection is not extended to "discovery" or facts. *See also* Int'l News Service v. Associated Press, 248 U.S. 215, 234 (1918) (identifying news articles with a "particular form or collocation of words in which the writer has communicated [the substance of the information]" as being unquestionably the subject of copyright).

[82] In a Sept. 16, 1997, letter to Congress, sixty-two copyright law professors expressed their concerns about the bill being "an unprecedented departure into the zone of what might be called paracopyright—an uncharted new domain of legislative provisions designed to strengthen copyright protection by regulating conduct

struggle for control over the bill between the House Judiciary Committee, which typically oversees intellectual property, and the House Commerce Committee, which viewed device regulation as its turf.[83]

One issue that attracted substantial commentary surrounded what then-Senator Ashcroft described as "the specter of moving our nation towards a 'pay-per-use' society."[84] As the Ninth Circuit has explained, "Congress was particularly concerned with encouraging copyright owners to make their works available in digital formats such as 'on-demand' or 'pay-per-view,' which allow consumers effectively to 'borrow' a copy of the work for a limited time or a limited number of uses."[85] In comparison, when consumers used to buy the videocassette of a movie or the audiocassette of an album, they were not restricted to playing them only a specified number of times or on specified types of devices. Ashcroft's "specter" of a pay-per-use society was a reference to the way in which the DMCA would usher in a fundamentally different era that could greatly favor the copyright owner at the expense of the copyright user. Today, the digital age permits content producers to market their products incrementally, thereby maximizing their ability to generate revenues from the same products. The copyright industry wanted Congress to solidify this possibility in the originally drafted version of the bill.

The original bill leading up to the DMCA was far more pro-copyright owner than what was finally enacted; it granted greater fair use protections for copyright users by the time the bill made its way through the House Judiciary and Commerce Committees. One such change was delegating au-

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which traditionally has fallen outside the regulatory sphere of intellectual property law." H.R. REP. NO. 105-551, pt. 2, at 31 (1998).

[83] The Commerce Committee had unsuccessfully sought to remove the anti-circumvention provisions from Title 17 altogether on the grounds that it had nothing to do with copyright:

> H.R. 2281, as reported by the Committee on the Judiciary, would regulate—in the name of copyright law—the manufacture and sale of devices that can be used to improperly circumvent technological protection measures. The Committee on Commerce adopted an amendment that moves the anti-circumvention provisions out of Title 17 and establishes them as freestanding provisions of law. The Committee believes that this is the most appropriate way to implement the treaties, in large part because these regulatory provisions have little, if anything, to do with copyright law. H.R. REP. NO. 105-551, pt. 2, at 23–24 (1998).

[84] 144 CONG. REC. S11887-01 (daily ed. Oct. 8, 1998) (statement of Sen. Ashcroft).

[85] MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 947 (2011).

thority to the Librarian of Congress for authorizing fair use exceptions every three years.[86] As Senator Ashcroft summarized:

> Under the compromise embodied in the conference report, the Librarian of Congress would have authority to address the concerns of libraries, educational institutions, and other information consumers potentially threatened with a denial of access to categories of works in circumstances that otherwise would be lawful today. I trust that the Librarian of Congress will implement this provision in a way that will ensure information consumers may exercise their centuries-old fair use privilege to continue to gain access to copyrighted works.[87]

The Librarian of Congress has identified several exceptions in the last decade, including the recent widely reported exception permitting jailbreaking the iPhone or other cell phone operating systems to run unauthorized apps upon switching cellular service providers.[88] The jailbreaking exception reflected the policy of prohibiting the improper use of copyright law to control the after-sale use of devices.

Even though the concern for protecting fair use is both expressly enunciated in section 1201 as well as supported in the legislative reports, critics continue to hold that the DMCA fair use safeguards are inadequate. The two competing policy paradigms that Congress weighed in drafting the DMCA are playing out in today's pay-per-view model of news delivery: one, that fair use is a remnant of a time when small uses could not be efficiently managed and paid for, a problem that is overcome in the digital world; the other, that fair use of copyrighted material must be especially protected in a pay-per-view digital world.[89] Legislative compromises made during the DMCA's enactment were partially intended to mitigate the latter concern, described as "the specter . . . of a 'pay-per-use' society" by Senator Ash-

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[86] 17 U.S.C. § 1201(a)(1)(C) (2006).

[87] 144 CONG. REC. S11887-01 (daily ed. Oct. 8, 1998) (statement of Sen. Ashcroft). One of Senator Ashcroft's key concerns was to also "ensure that . . . section 1201(a) did not inadvertently make it unlawful for parents to protect their children from pornography . . . or have unintended legal consequences for manufacturers of products designed solely to enable parents to protect their children in this fashion." S. REP. NO. 105-190, at 13. Senators Ashcroft, Leahy and Hatch sponsored the exception for the protection of minors contained in § 1201(k).

[88] *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825, 43,831 (July 27, 2010).

[89] David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA's Commentary*, 23 CARDOZO L. REV. 909, 967 (2002).

croft.[90] But Congress also recognized that technological advancements could make the pay-per-use model practical, efficient, and equitable.[91] As David Nimmer has argued, the pay-per-use model was not rejected because Congress outlawed it but because of technology limitations; future developments in technology could still make it practicable.[92] Scholars who place a high value on authors' rights praise the fact that the DMCA's protection for technological measures has fostered new business models to bring content to consumers at a variety of price point options.[93] These scholars argue that critics' fears of content being locked up behind digital walls simply have not materialized[94] or that the DMCA, by now permitting microconsent through technology—something that though possible was impractical to do through traditional licensing contracts—increases the incentives for creation and expands product diversity.[95]

Ultimately, the DMCA received the support of a wide variety of stakeholders with otherwise divergent interests.[96] Signed into law in October

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[90] 144 CONG. REC. S11887-01 (daily ed. Oct. 8, 1998) (statement of Sen. Ashcroft).

[91] The House Commerce Committee, which was particularly concerned with preserving fair uses, described the importance of developing a legal framework that was flexible enough to keep pace with technological advancements:

> [A] plentiful supply of intellectual property—whether in the form of software, music, movies, literature, or other works—drives the demand for a more flexible and efficient electronic marketplace. As electronic commerce and the laws governing intellectual property (especially copyright laws) change, the relationship between them may change as well. . . . [For] example, an increasing number of intellectual property works are being distributed using a "client-server" model, where the work is effectively "borrowed" by the user (e.g., infrequent users of expensive software purchase a certain number of uses, or viewers watch a movie on a *pay-per-view basis*). To operate in this environment, content providers will need both the technology to make new uses possible and the legal framework to ensure they can protect their work from piracy. H.R. REP. NO. 105-551, pt. 2, at 23 (emphasis added).

[92] Nimmer, *supra* note 89, at 967–68.

[93] Jane C. Ginsberg, *Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience*, 29 COLUM. J.L. & ARTS 11, 12 (2005).

[94] *Id.*

[95] *See* Randal C. Picker, *From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright*, 70 U. Chi. L. Rev. 281, 293–96 (2003).

[96] Senator Kohl's statement reflects the scale of the collaboration that was involved across many industries beyond the content owning industries:

1998 by President Clinton, the DMCA took the form of five titles. Section 1201, contained in the first title, is codified in Title 17 of the U.S. Code. It aimed to provide a remedy for digital piracy by creating an anticircumvention right for copyright owners who use technological measures to protect their works.[97] It also prohibited trafficking in devices that allow the public to circumvent protected works.[98] Section 1202 gives copyright owners enforcement rights for misuse of copyright management information included in their digital works.[99] Title II, added to Section 512 of the Copyright Act, immunizes Internet service providers from circumvention liability when they cooperate with copyright owners to detect and deal with online infringement.[100] Titles III and IV deal with exemptions from the anticircumvention provisions for service and repair, libraries and archives engaged in preserving works, and providers transmitting ephemeral reproductions.[101]

B. Content and Structure of Subsection 1201(a)(2)

Paragraph (a)(2) and more specifically (a)(2)(A), which prohibits trafficking in devices that circumvent access controls,[102] is the main focus of this article. Paragraph (a)(2)(A) reads:

> (2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

[The DMCA] is the product of intensive negotiations between all of the interested parties—including the copyright industry, telephone companies, libraries, universities and device manufacturers. And virtually every major concern raised during that process was addressed.

144 CONG. REC. S11887-01 (daily ed. Oct. 8, 1998) (statement of Sen. Kohl).

[97] *See* 17 U.S.C. § 1201(a)(1) (2006).

[98] *See* § 1201(a)(2).

[99] *See* § 1202 (2006).

[100] *See* 17 U.S.C. § 512 (2006).

[101] 144 CONG. REC. S11887-01 (daily ed. Oct. 8, 1998) (statement of Sen. Leahy). Additionally, Title IV protects webcasting rights for sound-recording copyright owners, and Title V protects boat hull design rights. *Id.*

[102] This is the second of three main prohibitions created in section 1201. The first bans the *act* of circumvention to gain access to a copyrighted work. § 1201(a)(1)(A). The third bans trafficking in devices that enable someone to circumvent a technological measure protecting a rights control in a copyrighted work. § 1201(b)(1)(A).

> (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title[.][103]

Paragraph 1201(a)(2) bans trafficking in devices designed to permit someone to circumvent a technological measure protecting *access* to a copyrighted work.[104] The plain language of the statute does not explicitly require an underlying copyright violation for anticircumvention liability to attach under any of the circumvention prohibitions of the DMCA.[105] The true focus of the DMCA is therefore not the copyrighted work itself, but rather the lock on the barn door.[106] Nevertheless, the protection can only be invoked when the right protected by the lock is a work protected under the Copyright Act.[107]

News aggregators potentially fall within the scope of paragraph (a)(2) as traffickers if their programs allow users to access copyrighted news content protected by a technological measure against unauthorized access. Liability under paragraph (a)(2) requires a plaintiff to show that news aggregators meet the following elements:

(1) Offer to the public, or provide any technology
(2) Primarily produced for circumventing a technological measure
(3) Effectively controls access
(4) A copyrighted work.[108]

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[103] § 1201(a)(2)(A)

[104] § 1201(a)(2).

[105] *See* §§ 1201(a)–(b).

[106] In this sense, the DMCA is a new protection. Recently, the Ninth Circuit recognized that because neither subsection 1201(a)(1) nor 1201(a)(2) "explicitly refers to traditional copyright infringement under § 106[,] . . . we read this term as extending a new form of protection, i.e., the right to prevent circumvention of access controls, broadly to works protected under Title 17, i.e., copyrighted works." MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 945 (9th Cir. 2011). The Federal Circuit has, however, declined to go as far as recognizing a separate right in the anti-circumvention provisions, characterizing it as simply a new way that property owners can secure their property against "digital trespass." Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1193–96 (Fed. Cir. 2004). The practical significance of this distinction has yet to play out fully in the courts, but it reflects the classic tension between the rights of copyright owners versus the rights of copyright users.

[107] 17 U.S.C. § 1201(a)(1)(A); *see also Chamberlain*, 381 F.3d at 1199; Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522, 547 (6th Cir. 2004).

[108] *See* MDY Indus., 629 F.3d at 953 (identifying six elements of a paragraph (a)(2) claim, which are collapsed into four in this paper).

Two additional provisions are relevant here. Paragraph (a)(3)(A) defines "circumventing a technological measure" to mean "to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner[.]"[109] The statute does not define "technological measure", but paragraph (a)(3)(B) provides the criteria to be used to determine whether a technology measure controls access to a work: "[A] technological measure 'effectively controls access to a work' if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work."[110]

Also relevant to news aggregators are the fair use provisions of the DMCA. Paragraph 1201(c)(1) states, "[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including *fair use,* under this title."[111]

C. The Fair Use Concern

News aggregators may argue that excerpting news articles along with a link to the original source constitutes fair use. Fair use is a pedigreed body of common law that was codified in the 1976 Copyright Act.[112] It circumscribes the exclusive rights of a copyright holder by allowing others to make use of portions of the copyrighted work for certain purposes.[113] Courts apply a four-factor test to determine whether a particular use is justified as fair use. The factors, codified in law, are:

1. The purpose and character of the use, including whether it is of a commercial nature or for nonprofit, educational purposes
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole;
4. The effect of the use upon the potential market for or value of the copyrighted work.[114]

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[109] § 1201(a)(3)(A).

[110] § 1201(a)(3)(B).

[111] § 1201(c)(1) (emphasis added); the doctrine of fair use is codified in 17 U.S.C. § 107.

[112] *See* 17 U.S.C. §107 (1994).

[113] *See id.* Section 107 lists such purposes as "criticism, comment, news reporting, teaching . . . scholarship, or research." *Id.*

[114] *Id.*

Fair use concerns made frequent appearances during Congress's deliberations on the DMCA.[115] Access control protections were intended to ensure that copyright owners received payment for the access.[116] But Congress also sought to ensure that the anticircumvention provisions in Section 1201 did not undermine the fair use of information protected under the Copyright Act.[117] Paragraph 1201(c)(1) expressly states that the DMCA leaves the fair use defense fully in force with regard to digital content.[118] The Senate Judiciary Committee further clarified that paragraph (c)(1):

> [d]oes not amend section 107 of the Copyright Act, the fair use provision. The Committee determined that no change to section 107 was required because section 107, as written, is technologically neutral, and therefore, *the fair use doctrine is fully applicable in the digital world as in the analog world.*[119]

While fair use immunizes direct acts of circumvention by users, it does not immunize the facilitation of circumvention by device manufacturers.[120] Paragraph 1201(a)(1), which covers direct acts of circumvention, contains several fair use exemptions and procedures.[121] Courts have viewed the placement of these fair use provisions under paragraph (a)(1) and their omission under paragraph (a)(2), which covers trafficking in circumvention devices, as evidence of Congress's intent that a device is not exempted from circumvention liability by virtue of its permitting fair uses.[122] The House

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[115] The term "fair use" appears nine times in the House Judiciary Committee Report, twenty-one times in the House Commerce Committee Report, and fourteen times in the Senate Report.

[116] *See* H.R. REP. NO. 105-551, pt. 1, at 10 (1998).

[117] *Id.* at 26.

[118] 17 U.S.C. § 1201(c)(1) (2006) ("Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title."). Subsection (c)(4) also provides that "[n]othing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products." § 1201(c)(4). The Senate Judiciary Committee clarified that "these provisions are intended to ensure that none of the provisions in section 1201 affect the existing legal regime established in the Copyright Act and case law interpreting that statute." S. REP. NO. 105-190, at 30 (1998).

[119] S. REP. NO. 105-190, at 23–24 (1998) (emphasis added).

[120] H.R. REP. NO. 105-551, pt. 2, at 18 (1998).

[121] § 1201(a)(1)(B)–(E).

[122] *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 444 (2d Cir. 2001) (explaining that authorization granted by a copyright owner for a direct act of circumvention cannot be a defense to a trafficking claim); Universal City Studios, Inc.

Committee on the Judiciary noted that the net effect of the law for consumers is that they "would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of a work which [they have] acquired lawfully."[123] Therefore, individual consumers of news content would not be prevented from circumventing access controls for fair uses of the news content. However, device manufacturers would have no immunity flowing to them from a user's circumvention for permissible fair use purposes.

Opinion has diverged on the DMCA's aims as it pertains to fair use. Some critically observe that the law grants content owners perpetual protection by permitting them to lock up their works in combination with public domain works behind digital pay walls.[124] They argue that the resulting protection is overbroad as it violates the constitutional mandate to free content for public access after a limited period of exclusive control.[125] Others argue that Congress intended to protect content owners' emerging business models in the digital age, including pay-per-use models that had become possible through advancements in technology for collecting micropayments efficiently.[126]

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v. Reimerdes, 111 F. Supp. 2d 294, 324 (S.D.N.Y. 2000) (explaining that the substantial noninfringing uses that a consumer could make with the trafficking device cannot absolve a trafficking claim), *aff'd*, 273 F.3d 429 (2d Cir. 2001). *But see* Chamberlain Group, Inc. v. Skylink Techs., *Inc.*, 381 F.3d 1178, 1196 n.13 (Fed. Cir. 2004) (explaining that "[f]or obvious reasons, § 1201(a)(2) trafficking liability cannot exist in the absence of § 1201(a)(1) violations"). In *Chamberlain*, the Federal Circuit's view of 1201(a)(2)(A) trafficking liability as a form of indirect or vicarious liability is neither consistent with plain language nor congressional intent. It is also not reconcilable with § 1201(c), which identifies "[o]ther rights, etc., not affected" and states in part that "[n]othing in this section shall enlarge or diminish vicarious or contributory liability for copyright infringement in connection with any technology, product, service, device, component, or part thereof." § 1201(c).

[123] H.R. Rep. No. 105-551, pt. 1, at 18 (1998) (explaining that subsection (a)(1) does not apply to subsequent acts after the user has gained access to the work).

[124] *See* David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. Pa. L. Rev. 673, 711-12 (2000).

[125] *See* Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 Berkeley Tech. L.J. 519, 524 (1999).

[126] *See* Ginsberg, *supra* note 93, at 12.

D. Overview of Case Law on (a)(2)(A)

The DMCA is only a decade old.[127] While the case law on the DMCA is still in its infancy, numerous district courts and circuits have interpreted its antitrafficking provisions. The following elemental analysis parallels the four elements required for a paragraph 1202(a)(2) violation, as enumerated in section II (B) above.[128]

1. Offer, Provide, or Otherwise Traffic in Any Technology

An (a)(2)(A) claim requires that the defendant "offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof."[129] The *Reimerdes* court offered the following common-meaning explanation of the verbs in this provision:

> To "provide" something, in the sense used in the statute, is to make it available or furnish it. To "offer" is to present or hold it out for consideration. The phrase "or otherwise traffic in" modifies and gives meaning to the words "offer" and "provide." In consequence, the anti-trafficking provision . . . is implicated where one presents, holds out or makes a circumvention technology or device available, knowing its nature, for the purpose of allowing others to acquire it.[130]

The anticircumvention provisions don't just implicate physical devices. While Congress did state that this language was "drafted carefully to target 'black boxes,'"[131] the statute is explicitly worded to reach a broad variety of technologies, from hardware devices to software programs and components.[132] A broad range of technologies fall within the orbit of the antitrafficking provision. Automated bot programs that allow users to play online games by circumventing access controls count as trafficking.[133] Mere posting and hyperlinking may also count as providing or trafficking within the

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[127] Enacted in the 105th Congress in 1998, the DMCA went into effect January 1, 2000.

[128] *See supra* p. 220.

[129] 17 U.S.C. § 1201(a)(2) (2006).

[130] Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 325 (S.D.N.Y 2000), *aff'd*, 273 F.3d 429 (2d Cir. 2001).

[131] S. REP. NO. 105-190, at 29 (1998).

[132] H.R. REP. NO. 105-551, pt. 1, at 18 (1998).

[133] *See* MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 953 (9th Cir. 2011) (finding *Glider*, a bot program that facilitates playing the online game, *World of Warcraft,* to be a circumventing technology).

meaning of the DMCA.[134] In *Corley*, the Second Circuit held that a defendant violated the DMCA by posting hyperlinks to the DeCSS program on a website devoted to the hacking community.[135] More recently, a California district court held that an Internet browser tool, requiring human interaction, that allowed users to buy tickets in bulk from a variety of websites, was a trafficking technology.[136]

2. Primarily Produced for Circumventing a Technological Measure

Paragraph (a)(2)(A) requires that the defendant's technology be "primarily designed or produced for the purpose of circumventing a technological measure . . . ."[137] A plaintiff must prove that its technological protection measure was the primary target of the defendant's circumventing technology.[138] The Ninth Circuit in *MDY Industries v. Blizzard Entertainment* held that the automated program, Glider, was primarily designed to circumvent a technological measure because it was marketed that way and because it did not have any other use or purpose than to circumvent the plaintiff's World of Warcraft access-restriction technology.[139]

But what is a "technology measure?" The DMCA does not provide a definition for the term. Congress deliberately sought to avoid defining specific standards for technology protection measures.[140] In Congress' judg-

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[134] *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 454 (2d Cir. 2001).

[135] *See id.*

[136] Ticketmaster, LLC v. RMG Techs., Inc., 507 F. Supp. 2d 1096, 1111–12 (C.D. Cal. 2007).

[137] 17 U.S.C. § 1201(a)(2)(A) (2006).

[138] *Id.*; *see also* Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1202 (Fed. Cir. 2004) (explaining that the plaintiff has this burden of proof).

[139] MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 953 (9th Cir. 2011). These two grounds—any other use/purpose and method of marketing—implicate § 1201(a)(2)(B) and (C), respectively.

[140] The concern is evident in numerous references to preserving industry's voluntary process for establishing technology standards in the Senate Judiciary Committee report on the DMCA. *See* S. REP. NO. 105-190, at 37–38, 52 (1998). Senator Leahy further elaborated this concern during debates on the DMCA that its provisions should not be interpreted to establish "a precedent for Congress to legislate specific standards or specific technologies to be used as technological protection measures, particularly with respect to computers and software" and adding that "[g]enerally, Congress should not establish technology specific rules; technology develops best and most rapidly in response to marketplace forces." 144 Cong. Rec. S11887-01 (daily ed. Oct. 8, 1998) (statement of Sen. Leahy).

ment, such standards were better left to market forces.[141] In its view, minimalist technological measures, like password protection schemes, could qualify for anticircumvention protection. One of the first examples of circumventing a technological measure cited by the Senate Judiciary Committee was the evasion of password protection:

> For example, if unauthorized access to a copyrighted work is effectively prevented through use of a password, it would be a violation of this section to defeat or bypass the password and to make the means to do so, as long as the primary purpose of the means was to perform this kind of act. This is roughly analogous to making it illegal to break into a house using a tool, the primary purpose of which is to break into houses.[142]

Courts also recognize that password protection schemes qualify as technological protection measures. The Second Circuit in *Corley* noted that password protection schemes are technological measures within the meaning of the DMCA.[143] Two California district courts have ruled that CAPTCHA routines, which are designed to ensure that only human users—and not automated or robot programs—are technology protection measures.[144] For instance, in *Craigslist v. Naturemarket*, Craigslist sued the operators of Power posting.com for enabling users to automate their classified advertising by quantity, frequency, and location.[145] The district court held that Power posting.com's automated software circumvented Craigslist's CAPTCHA routine.[146]

District courts in New York and Ohio have also held password protection schemes to be technological measures in two cases, although neither

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[141] 144 Cong. Rec. S11887-01 (daily ed. Oct. 8, 1998).

[142] S. REP. NO. 105-190 at 11 (1998) (footnote omitted).

[143] Universal City Studios, Inc. v. Corley, 273 F.3d 429, 435 (2d Cir. 2001).

[144] Craigslist, Inc. v. Naturemarket, Inc., 694 F. Supp. 2d 1039, 1056 (N.D. Cal. 2010) (holding that the defendant's posting programs had illegally circumvented Craigslist CAPTCHA program by automatically posting classified advertisements on Craigslist.com); Ticketmaster L.L.C. v. RMG Techs., Inc., 507 F. Supp. 2d 1096, 1112 (C.D. Cal. 2007) (holding that the defendant's internet browser tool was used to illegally circumvent Ticketmaster's CAPTCHA program to purchase large quantities of tickets). Plaintiffs in both cases also had explicit terms of use on their respective websites forbidding the specific type of circumvention alleged in each.

[145] Craigslist, 694 F. Supp. 2d at 1048–49.

[146] *Id.* at 1056.

court found that these schemes were circumvented.[147] In the New York case, an advertising tracking service that sold its product through a password-protected website to clients sued a competitor for using a password obtained from a third party to copy components of its tracking service.[148] The Southern District of New York acknowledged that password protection schemes could be technological measures.[149] However, the court declined to find a section 1201 violation because the "[d]efendant did not surmount or puncture or evade any technological measure to [access the plaintiff's protected webcite]; instead, it used a password intentionally issued by [the] plaintiff to another entity."[150] An Ohio district court followed its New York counterpart's reasoning in a data-processing software case.[151] In that case, a credit union gave the password it used to access a data-processing software system to a vendor developing a competing system; the data-processing software company sued.[152] The Ohio court found that the credit union "did not circumvent or bypass any technological measures of the [plaintiff's] software—it merely used a username and password—the approved methodology—to access the software."[153]

One possible way to reconcile the different results between the CAPTCHA and password protection cases is to interpret circumvention as including only acts that are characteristically automated or non-human interactions. However, such an interpretation is not explicit in either the plain language of the statute or the congressional record.

The key to finding circumvention is not the technological nature of the access, but whether the access was authorized. A device circumvents a technological measure if it "descramble[s] a scrambled work, . . . decrypt[s] an encrypted work, or otherwise . . . avoid[s], bypass[es], remove[s], deactivate[s], or impair[s] a technological measure, *without the authority of the copyright owner*. . . ."[154] Consistently, the Southern District Court of New York in *Reimerdes* emphasized that decryption or avoidance of an access control

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[147] *See* R.C. Olmstead, Inc. v. CU Interface, LLC, 657 F. Supp. 2d 878 (N.D. Oh. 2009); I.M.S. Inquiry Mgmt. Sys., Ltd. v. Berkshire Info. Sys., Inc., 307 F. Supp. 2d 521 (S.D.N.Y. 2004).

[148] I.M.S. Inquiry, 307 F. Supp. 2d at 523.

[149] *Id.* at 531.

[150] *Id.* at 532–33.

[151] R.C. Olmstead, 657 F. Supp. 2d at 889.

[152] *See id.* at 884.

[153] *Id.* at 889.

[154] 17 U.S.C. § 1201(a)(3)(A) (2006) (emphasis added).

measure is not circumvention unless it is also unauthorized.[155] The object of the authorization is the access-control technology, not the usage rights granted by the copyright holder to users. The proper question to be asked is: Did the copyright holder give authorization to circumvent the access control? In reviewing the *Reimerdes* decision, the Second Circuit agreed that while the purchaser of a DVD has the authority of the copyright owner to view the DVD, the authority for decrypting the DVD's CSS control using nonlicensed software cannot be implied from such purchase.[156] Therefore, purchase alone does not imply authorization to circumvent an access control.

In *Craigslist* and *Ticketmaster*, two California district courts correctly focused on the issue of authorization to the access control technology.[157] For example, Craigslist's website's terms of use explicitly forbade automated circumvention of its live posting functionality.[158] The court based Powerposting.com's violation on that explicit denial of authorization.[159] Further, the fact that postings were a generally permitted use was not material in the court's analysis. This interpretation is consistent with the *Reimerdes* court's reasoning in which authorization for a consumer to decrypt and view the DVD using a licensed DVD player did not imply authorization for the defendant to post the circumventing DeCSS code on a website.[160]

Some courts have, however, incorrectly focused on authorization for consumer use instead of analyzing whether the access control was circumvented without authorization, explicit or otherwise.[161] When a court confuses authorization for bypassing an access-control technology with authorization for use, it amounts to an additional requirement of underlying infringement that is contrary to the plain language of the DMCA. The Federal Circuit's opinion in *Chamberlain* reflected this confusion when it de-

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[155] Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 317 n.137 (S.D.N.Y. 2000), *aff'd*, 273 F.3d 429 (2d Cir. 2001).

[156] Universal City Studios, Inc. v. Corley, 273 F.3d 429, 444 (2d Cir. 2001).

[157] *See* Craigslist, Inc. v. Naturemarket, Inc., 694 F. Supp. 2d 1039, 1056 (N.D. Cal. 2010); Ticketmaster L.L.C. v. RMG Techs., Inc., 507 F. Supp. 2d, 1096, 1112 (C.D. Cal. 2007). It should be noted that neither the New York nor the Ohio district courts in *I.M.S. Inquiry* and *R.C. Olmstead*, analyzed the correct issue–authorization for circumvention of an access control–but instead analyzed the inappropriate issue of authorization for use.

[158] *Craigslist*, 694 F. Supp. 2d at 1048.

[159] *Id.* at 1056.

[160] *See Corley*, 273 F.3d at 444 (reviewing the Reimerdes decision).

[161] *See, e.g.*, Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1193 (Fed. Cir. 2004) (suggesting that proof of authorized usage, or copying of a software in that case, is an element of an anticircumvention claim).

clared that "[d]efendants who traffic in devices that circumvent access controls in ways that *facilitate infringement* may be subject to liability under § 1201(a)(2). . . . [And] defendants whose circumvention devices do not *facilitate infringement*, are not subject to § 1201 liability."[162] If the Federal Circuit meant that evidence of actual infringement was required, the requirement would be at odds with congressional intent and the vast majority of opinions dealing with paragraph (a)(2). While the majority of courts have upheld the requirement that the protection measure must control access to a copyrightable work, no other court has also required an underlying infringement. The confusion over authorization for use versus circumvention is also reflected in a circuit split related to the requirement of an underlying infringement. Unlike the Federal Circuit, the Second Circuit,[163] along with the Ninth Circuit, do not require an underlying infringement to bring an (a)(2)(A) cause of action. In *MDY Industries,* the Ninth Circuit observed that two of the acts listed in paragraph (a)(3)(A), which defines circumvention, do not necessarily result in infringing activity.[164] Both descrambling and decrypting may permit non-infringing viewing of protected works without permitting infringing distributing or copying. The Ninth Circuit was, therefore, satisfied that Congress did not intend an infringement nexus.[165]

3. Effectively Controls Access

A plaintiff must prove that the technological protection measure employed "effectively controls access to a work protected under this title."[166] A measure effectively controls access when, "in the ordinary course of its operation, [it] requires the application of information, or a process or a treat-

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[162] *Id.* at 1195 (emphasis added). The Federal Circuit rejected Chamberlain's assertion that it had not provided Skylink with permission because it rested on the faulty underlying assumption that "Chamberlain is entitled to prohibit legitimate purchasers of its embedded software from 'accessing' the software by *using* it." *Id.* at 1202 (emphasis added). This is further evidence of the Federal Circuit's confusing of authorization for consumer use with authorization for Skylink's access. *See id.* at 1202.

[163] In *Reimerdes,* the New York district court observed, "Whether defendants did so in order to infringe, or to permit or encourage others to infringe, copyrighted works in violation of other provisions of the Copyright Act simply does not matter for purposes of Section 1201(a)(2)." Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 319 (S.D.N.Y. 2000), *aff'd*, 273 F.3d 429 (2d Cir. 2001).

[164] MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 950 (9th Cir. 2011).

[165] *Id.*

[166] 17 U.S.C. § 1201(a)(2)(A) (2006); *Chamberlain*, 381 F.3d at 1202.

ment, with the authority of the copyright owner, to gain access to the work[s]."[167]

In *Lexmark v. Static Control Components*, the Sixth Circuit interpreted "effectively controls access" to mean that the access control must directly protect the copyrightable work and not a function.[168] The court declined to find an (a)(2) violation for a program that controlled access to use of a printer without controlling the literal copyrightable software code in the program.[169] But the court confused its explanation when it stated that restricting one avenue while leaving another wide open rendered the program ineffective and thus outside the scope of DMCA protection.[170] Under this reading of "effectively," only one form of access to material is controlled, or access is controlled to only a certain subset of people, the partial access control would not be protectable under the DMCA.

The Ninth Circuit offers some clarity here. It interpreted "effectively" to mean that the access control measure must protect the copyrighted work consistently in terms of both a spatial and temporal connection between the access control measure and the work being protected.[171] In the case of the component non-literal elements of the computer game World of Warcraft, such as its visual and aural parts, the Ninth Circuit held that Warden, the asserted access control, was ineffective because a player could access them at any time without encountering Warden.[172]

However, Warden was an access control within the meaning of the DMCA for the game's dynamic non-literal elements, such as the game experience, because a player encountered it, albeit not always, during play.[173] Both the Sixth and Ninth Circuits seem to be saying that the access control measure must be consistently connected to the copyrightable work in order to meet the effectiveness standard. The Sixth Circuit's example of leaving

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[167] § 1201(a)(3)(B).

[168] Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522, 546 (6th Cir. 2004).

[169] *Id.* at 546–47.

[170] *Id.* at 547 (explaining that "the DMCA not only requires the technological measure to 'control[ ] access' but also requires the measure to control that access 'effectively,' and it seems clear that this provision does not naturally extend to a technological measure that restricts one form of access but leaves another route wide open") (citations omitted).

[171] *See* MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 953–54 (9th Cir. 2011).

[172] *Id.* at 952.

[173] *Id.* at 954

the back door open while locking the front door[174] would be a better explanation reframed as expecting the entire house to be protected when only a door to an inside room had been locked.

Further, courts have clarified that the phrase "effectively controls access to a work" does not require that the protection be sufficiently strong or even actually work; rather, a protection effectively controls access if its *function* is to control access.[175] Therefore, whether the password-protection scheme is technically the strongest or the best type of measure that could control access is immaterial in the analysis.

The Second Circuit in *Corley* and the district courts in *Craigslist* and *Ticketmaster* emphasized that a measure is an access control when it literally prevents a user from experiencing or perceiving the site "in the ordinary course of operation."[176] These courts did not impose additional requirements, such as the protection being consistently operational[177] or that no other backdoor means of access exist.[178] For example, the *Craigslist* court held that a CAPTCHA scheme protected copyrightable material by virtue of simply controlling access to experiencing the website in general.[179]

4. A Copyrighted Work

The antitrafficking provision applies to "work[s] protected under this title."[180] Accordingly, the Federal Circuit has clarified that anticircumvention technologies are only implicated if they "bear a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners."[181] In *Chamberlain*, the Federal Circuit correctly declined to extend the reach of the DMCA to products that had an indirect connection to copyrightable subject matter by virtue of having software simply embedded

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[174] *See supra* note 170

[175] *E.g.*, Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 318 (S.D.N.Y.), *aff'd*, 273 F.3d 429 (2d Cir. 2001).

[176] *See also* 17 U.S.C. § 1201(a)(3)(B) (2006).

[177] *See* MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 953–54 (9th Cir. 2011).

[178] *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522, 547 (6th Cir. 2004).

[179] Craigslist, Inc. v. Naturemarket, Inc., 694 F. Supp. 2d 1039, 1056 (N.D. Cal. 2010).

[180] § 1201(a)(2)(A)

[181] Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1202 (Fed. Cir. 2004).

somewhere in a product.[182] However, the court went too far in requiring an infringement nexus for a 1201(a)(2) claim.[183] The Federal Circuit also stated that (a)(2) liability could not attach without the existence of (a)(1) liability, much like contributory infringement cannot exist without direct infringement.[184] But an (a)(2) violation does not require an underlying act of copyright infringement per the plain language of the statute. Additionally, there is nothing in the statute to justify the analogy to contributory liability.[185]

The Federal Circuit's real concern in *Chamberlain* was to prevent a plaintiff from using the DMCA to make an end-run around the doctrine of copyright misuse and antitrust law.[186] In *Chamberlain*, a garage door manufacturer sought an injunction against the maker of a universal transmitter, Skylink, on grounds that Skylink had impermissibly used Chamberlain's "rolling code" to enable its transmitter to be used with Chamberlain's garage door opener.[187] The court held that no DMCA violation had occurred because the circumventing access by a competitor's garage door opener was a legitimate use and did not infringe on a right protected under the Copyright Act.[188] It therefore foreclosed severing "access" from "protected right" out

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[182] *Id.*

[183] *Id.* at 1195.

[184] *Id.* at 1196 n.13.

[185] *See supra* note 122.

[186] Chamberlain had made the argument that the DMCA now made all uses of products containing copyrighted software to which a technological measure controlled access *per se* illegal unless the manufacturer provided consumers with explicit authorization. The Federal Circuit observed that Chamberlain's interpretation would grant manufacturers broad exemptions from both the antitrust laws and the doctrine of copyright misuse:

> In a similar vein, Chamberlain's proposed construction would allow any manufacturer of any product to add a single copyrighted sentence or software fragment to its product, wrap the copyrighted material in a trivial "encryption" scheme, and thereby gain the right to restrict consumers' rights to use its products in conjunction with competing products. In other words, Chamberlain's construction of the DMCA would allow virtually any company to attempt to leverage its sales into aftermarket monopolies–a practice that both the antitrust laws and the doctrine of copyright misuse normally prohibit. *Chamberlain,* 381 F.3d at 1201 (footnote omitted) (citations omitted).

[187] *See* Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1183 (Fed. Cir. 2004).

[188] *Id.* at 1201–03.

of a broader concern for allowing an end-run around antitrust and copyright misuse laws.[189]

The Sixth Circuit's denial of a DMCA claim in *Lexmark* may have been informed by similar policy concerns. The court was concerned about permitting a printer manufacturer to use the DMCA to lock up its market for toner cartridges. However, the Sixth Circuit denied Lexmark's claim on the narrower grounds that no access control had been circumvented.[190] The court found that Lexmark's Printer Engine Program simply did not control access to the literal code of the program; rather, it was the act of purchasing a Lexmark printer that controlled this access.[191] The court reasoned that because anyone who purchased the printer could access the literal code, no access control had been circumvented.[192]

E. Overview of Fair Use Case Law

Section 107 identifies four factors to be used to determine whether a use is exempted as fair use. The first factor relates to the purpose and character of the use, including whether it is of a commercial nature or for nonprofit, educational purposes.[193] The Supreme Court has clarified that the key "is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[194]

The second factor, the nature of the copyrighted work, "calls for the recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied."[195]

The third factor is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[196] The amount used in percentage terms alone does not determine the outcome.[197] Qualitative con-

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[189] *Id.*

[190] Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522, 546–47 (6th Cir. 2004).

[191] *Id.*

[192] *Id.*

[193] 17 U.S.C. § 107(1)(1994).

[194] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985).

[195] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994).

[196] § 107(3).

[197] *See Campbell*, 510 U.S. at 586.

siderations also matter.[198] For example, a major proportion of the copyrighted work may be fairly used in a parody owing to the very nature of parody.[199] But the same proportion excerpted for another type of use may not.[200]

The final factor, the effect of the use upon the potential market for or value of the copyrighted work, requires asking "'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original."[201]

In *Chamberlain*, the Federal Circuit expressed several concerns about giving content owners the unlimited right to hold circumventers liable even for content that was fairly accessible to the public.[202] One of those concerns was about the vast right it would give copyright owners "through a combination of contractual terms and technological measures, to repeal the fair use doctrine with respect to an individual copyrighted work."[203]

The Ninth Circuit recently expressly disagreed with the Federal Circuit's listing of concerns, including those surrounding the locking up of fair use.[204] It criticized the Federal Court for going beyond the plain language of the statute to reach policy judgments best left to Congress.[205]

Despite that disagreement, courts have generally declined to immunize device manufacturers from circumvention liability on the basis of individual users' fair use rights.[206] Case law supports the principle that a circumvention device is illegal even if it restricts some fair uses, as long as fair use avenues are still otherwise available to a user.[207] In *United States v. Elcom*, the court found that the defendant had violated the DMCA by manufacturing

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[198] *See id.* at 587.

[199] *See id.* at 588–89.

[200] *See id.*

[201] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) (citing 3 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 13.05[A][2] (1993)).

[202] Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1200 (Fed. Cir. 2004).

[203] *Id.* at 1202.

[204] MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 948-50 (9th Cir. 2011).

[205] *Id.* at 950.

[206] *See e.g.*, Universal City Studios, Inc. v. Corley, 273 F.3d 429, 443 (2d Cir. 2001); United States v. Elcom, Ltd., 203 F. Supp. 2d 1111, 1123–24 (N.D. Cal. 2002).

[207] This principle has been seen in several key anti-circumvention cases, including Universal Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294 (S.D.N.Y. 2000);

and marketing software that allowed users to disable the plaintiff's eBook controls on copying and printing.[208] Finding that fair use was not affected, the court in *Elcom* explained that while "[t]he fair user may find it more difficult to engage in certain fair uses with regard to electronic books, . . . fair use is [nevertheless] still available."[209] For instance, users could conceivably make screen captures of eBook content or they could manually copy excerpts from the book for their fair use purposes, among other ways.

IV. When a News Aggregator Distributes a News Website's Password-Protected Content, Does Subsection (A)(2)(A) Apply?

A. § 1201(a)(2)(A) Analysis

1. Offer, Provide Or Otherwise Traffic In Any Technology

A news aggregator's automated technology for reading a news website's RSS[210] feed content is likely to qualify as "any technology"[211] within the meaning of the DMCA. RSS is a web-based technology that allows the syndication of online content, hyperlinks, and other information.[212] Commonly found on websites generally, RSS feeds enable news websites to make their content available to a wide variety of standalone newsreaders or web-based portals.[213] For consumers, RSS feeds offer the convenience of content customized to their interests. They can set their browsers and mobile devices to fetch and display RSS feed content according to their individual preferences.[214] While individuals often use newsreaders, like Google Reader, to access RSS feed content individually, a news aggregator like

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Corley, 273 F.3d 429; and 321 Studios v. MGM Studios, Inc., 307 F. Supp. 2d 1085 (N.D. Cal. 2004).

[208] *Elcom,* 203 F. Supp. 2d at 1123–24.

[209] *Id.* at 1134-1135; *see also Corley*, 273 F.3d at 459 ("Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique or in the format of the original.")

[210] RSS stands for Really Simple Syndication.

[211] 17 U.S.C. § 1201 (a)(2) (2006).

[212] John N. Malala, *Upshot of RSS Technology on Website Promotion,* 2 J. Website Promotion 5, 6 (2006).

[213] *See id.*

[214] *Id.*

Google News fetches and displays information for larger audiences.[215] The displayed content can take the form of headlines, abstracts, full-text articles, or links. The news aggregator's automated software for fetching content from source news websites and its subsequent display of that content on its own web portal or standalone newsreader is the technology implicated in this analysis. The antitrafficking provision is in play if the news aggregator "presents, holds out or makes a circumvention technology . . . available, knowing its nature, for the purpose of allowing others to acquire it."[216] If the news aggregator's automated technology of fetching and displaying content in a web-based or standalone application can be acquired by others, it is sufficient to bring it within the scope of subsection (a)(2).[217]

2. Primarily Produced For Circumventing A Technological Measure

A news website must also show that the news aggregator's automated fetch and display technology is primarily designed to bypass its own technology protection measure: a password protection scheme.[218] The case law, which is buttressed in explicit legislative history, squarely supports the conclusion that a news website's password protection scheme can be a technology protection measure within the meaning of the DMCA.[219]

However, courts are likely to diverge on the question of whether the aggregator's fetch and display technology rises to the level of circumvention. Jurisdictions following the *I.M.S. Inquiry* and *R.C. Olmstead* line of cases may decline to find circumvention where a news aggregator did not "surmount or puncture or evade" a technological measure.[220] After all, a person representing the news aggregator could simply set up a password-protected account to gain legitimate access to the website's content. The news aggregator's access, thereafter, for automated aggregation purposes would be unlikely to constitute circumvention because no technology measure had to be evaded.

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[215] *See infra* p. 238.

[216] *See* Universal Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 325 (S.D.N.Y. 2000).

[217] *See id.*

[218] 17 U.S.C. § 1201(a)(2)(A) (2006).

[219] *See supra* p. 234.

[220] I.M.S. Inquiry Mgmt. Sys., Ltd. v. Berkshire Info. Sys., Inc., 307 F. Supp. 2d 521, 531-32 (S.D.N.Y. 2004); R.C. Olmstead, Inc. v. CU Interface, LLC, 657 F. Supp. 2d 878, 889 (N.D. Oh. 2009).

The key to finding circumvention, as explained in subsection (a)(3)(A), is whether access was authorized.[221] However, a news website's anticircumvention claim against a news aggregator should not be disallowed on the basis of lack of authorization for a consumer's use, because this view is unsupported in the plain language of the statute. The proper basis is the absence of authorization for circumvention of an access control.[222] Jurisdictions choosing to follow the Federal Circuit would not find circumvention where users had the authority to otherwise use the news website's content.[223] But the Second[224] and Ninth[225] Circuits would not require proof of underlying infringement, only that an access control that prevented a user from perceiving a site was circumvented.

Further, jurisdictions following the *Craigslist* and *Ticketmaster* line of cases would find circumvention where an explicit term of use on a website prohibited the news aggregator's specific type of access.[226] Assuming there is an explicit lack of authorization for automated fetch and display technologies of news aggregators, DMCA liability would attach on the circumvention element.[227]

News websites commonly publish RSS feeds that RSS readers like Google Reader can read for personal, noncommercial use. *The New York Times* website, www.NYTimes.com, provides an example. Its RSS page contains the following terms to emphasize the noncommercial scope of its permission:

> Terms & Conditions: We encourage the use of NYTimes.com RSS feeds for personal use in a *newsreader* or as part of a non-commercial blog. We require proper format and attribution whenever New York Times content is posted on your web site, and we reserve the right to require that you

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[221] *See supra* p. 227.

[222] *See* § 1201(a)(3)(A).

[223] *See* Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1193 (Fed. Cir. 2004).

[224] Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 319, *aff'd*, 273 F.3d 429 (2d Cir. 2001).

[225] MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 951 (9th Cir. 2011).

[226] *See, e.g.*, Craigslist Inc. v. Naturemarket, Inc., 694 F. Supp. 2d 1039, 1048–49 (N.D. Cal. 2010) (enjoining defendant powerpostings.com from facilitating automated ad postings on craigslist.com in violation of the site's terms of use forbidding unauthorized automated postings).

[227] *See, e.g.*, *id.*; Ticketmaster L.L.C. v. RMG Techs., Inc., 507 F. Supp. 2d 1092, 1112 (C.D. Cal 2007).

> cease distributing NYTimes.com content. Please read the Terms and Conditions for complete instructions.[228]

A newsreader, in contrast to a news aggregator, is a standalone or web-based portal that allows a user to receive organized and personalized information according to his or her preferences.[229] News aggregators often populate their sites using the same RSS feed code prepared by news websites for use with a newsreader.[230] While newsreaders and aggregators function in the same manner and deliver similar benefits of organization and convenience, they are substantially different. A newsreader is used by individuals to receive personalized news content.[231] A news aggregator, on the other hand, is a commercial entity that gathers content to attract a large number of individuals, typically deriving revenue directly or indirectly from the resulting traffic.[232]

While the explicit grant of permission by www.NYTimes.com for personal use in a newsreader explicitly precludes commercial use by blogs, many other news websites do not have similarly explicit terms.[233]

The existence of the password protection scheme alone may not be a sufficient basis for a court to find an implied lack of authorization for news aggregators within the meaning of the anticircumvention provisions. In *Chamberlain*, the Federal Circuit affirmed the district court's finding that unconditioned sales by a maker of garage door openers implied authorization for a competitor to sell a compatible transmitter because it never restricted its customers' use of competing transmitters.[234] The district court declined to read an implicit restriction from the absence of any discussion of competing products on the plaintiff's website.[235] A news website must present evidence of additional explicit terms prohibiting news aggregator access in its

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[228] *RSS*, N.Y. TIMES, *available at* http://www.nytimes.com/services/xml/rss/index.html (emphasis added). The detailed Terms and Conditions page referenced expands on terms for individual use and does not explicitly address authorization (or nonauthorization) for commercial news aggregators. *RSS Terms and Conditions*, N.Y. TIMES, *available* at www.nytimes.com/services/xml/rss/termsconditions.html.

[229] Annette Lamb & Larry Johnson, *Web Feeds Delivered To Your Digital Doorstep,* 36 TCHR. LIBR. 66, 66 (2009).

[230] *Id.*

[231] *Id.*

[232] *See* Netanel, *supra* note 2, at 979.

[233] *See e.g.*, WASH POST, http://www.washingtonpost.com (last visited Apr. 14, 2011) (website does not contain similar terms of use for its RSS feeds).

[234] Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1187 (Fed. Cir. 2004).

[235] *Id.*

website's terms of use to meet the DMCA's authorization test. A showing of explicit terms of use that prohibit aggregators from harvesting its news content for commercial purposes may prove that a news aggregator's use of the password protection system is unauthorized.

3. Effectively Controls Access

The case law is mixed here on the question of whether password protection "effectively controls access"[236] to a news website's content. A jurisdiction following the Sixth Circuit's reasoning in *Lexmark* may hold that the password protection scheme does not effectively control access to the news website's content because it does not raise a specific barrier against automated access by the news aggregator's software. For one, a password control measure is designed to allow access to individuals who create user accounts with the news website. Anyone can obtain and use the same content by simply going online and creating a password-protected account for instance.[237] Where one avenue of access is controlled but another is unrestricted, a court following the *Lexmark* line of reasoning could conclude that the password protection scheme did not effectively control access.

However, *Lexmark's* reasoning should not be interpreted to require a qualitatively effective access control, as clarified by the Ninth Circuit in *Blizzard.* Such a requirement is not evident in the plain language of the statute. And, as the *Reimerdes* court recognized, if the DMCA could only be applied where protection was always effective, it would lead to the absurd result of the law offering protection in situations where it was least needed and withholding it where it was most essential.[238] It is because access controls are inevitably breached that piracy exists in the first place. Like the Second Circuit in *Corley* and the district courts in *Craigslist* and *Ticketmaster*, a court should view a news website's password scheme to be an access con-

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[236] *See* 17 U.S.C. § 1201(a)(2)(A) (2006).

[237] *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522, 546–47 (6th Cir. 2004).

[238] Declining to adopt the defendant's view of "effectively controls," the *Reimerdes* court explained:

> [d]efendants' construction, if adopted, would limit the application of the statute to access control measures that thwart circumvention, but withhold protection for those measures that can be circumvented. In other words, defendants would have the Court construe the statute to offer protection where none is needed but to withhold protection precisely where protection is essential. Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 318, *aff'd*, 273 F.3d 429 (2d Cir. 2001).

trol because it literally prevents a user from experiencing or perceiving the site "in the ordinary course of its operation."[239]

4. A Copyrighted Work

The news industry's products are undoubtedly works protected under the Copyright Act. In contrast, the Sixth Circuit's decision favoring the defendant in *Lexmark* largely rested on the fact that the product implicated simply was not a subject of the Copyright Act: a functional lock-out code for toner cartridges.[240] The Sixth Circuit may have been concerned about permitting a printer manufacturer to use the DMCA to lock up its market for toner cartridges.[241] Lexmark ostensibly argued that the defendant toner cartridge manufacturer had unlawfully gained access to its copyrighted Printer Engine Program, which checked toner levels before allowing access to printer functions.[242] Lexmark's real purpose was to prevent rival toner cartridge manufacturers from marketing refurbished Lexmark toner cartridges without payment to Lexmark.[243] Here, there is no similar concern of misusing copyright law to control markets for products unrelated to the Copyright Act. This critical distinction ought to weigh in the news industry's favor.[244]

B. Fair Use Analysis

News aggregators will inevitably raise a fair use defense. They are likely to argue that it is common practice for bloggers and news aggregators to repurpose and republish news content for commercial purposes without attribution or payment.[245] Attributor Corporation's Fair Syndication Consortium found that, in just one month in 2009, over 75,000 unlicensed websites had reused U.S. newspaper content.[246] Nearly 112,000 unlicensed

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[239] § 1201(a)(3)(B).

[240] *Lexmark*, 387 F.3d at 529.

[241] *See id.*

[242] *Id.*

[243] *See id.* at 530–31.

[244] *See* 17 U.S.C. § 1201(a)(2)(A) (2000) (stating that liability attaches only when "a work protected under this title" is implicated).

[245] Netanel, *supra* note 2, at 978–79.

[246] Fair Syndication Consortium, *Fair Syndication Consortium Research Brief: How U.S. newspaper content is reused and monetized online*, ATTRIBUTOR (Dec. 1, 2009), Link to report *available at* http://www.attributor.com/index.php/blog/2009/12/01/9-newspaper-content-matters

full copies of news articles were detected during the study, with Google and Yahoo! ad networks commercializing the largest share of such content.[247] Such re-use arguably deserves fair use protection because it promotes important fair use values. A key inquiry will therefore be to determine whether such re-use and repurposing, when conducted by commercial news aggregators, constitutes fair use.

A news aggregator's argument based on protection of individual users' fair use rights will not immunize it from circumvention liability.[248] Further, drawing a parallel between news aggregators' use of news content to search engines' use of the same content on valuable fair use grounds will be unlikely to withstand close examination. Courts have exempted the cataloging of digital content by search engines from copyright liability on fair use grounds, even when the content is cataloged for commercial purposes.[249] Although a search engine, like Google, may sell advertising based on search terms resulting in the display of copyrighted news articles, the search engine's commercialization of news content nevertheless outweighs a plaintiff's copyright interest. The key to the search engine fair use conclusion is the transformative value of the indexing and information-location functions to the public, which cannot be accomplished by individuals in any other way. But even the Senate Committee on the Judiciary noted that search engines could be "obvious infringe[rs]" if their links to infringing sites reflected actual knowledge of infringement and their use went beyond mere indexing to qualify as fair use.[250] News aggregators like *Google News* or *Yahoo! News* may similarly be found to be obvious infringers if the news aggregation operation itself is purposefully designed to distribute another news source's access-controlled content to the subscriber without authorization or payment.

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[247] *Id.*

[248] *See, e.g.*, Universal City Studios, Inc. v. Corley, 273 F.3d 429, 443 (2d Cir. 2001) (clarifying that § 1201(c)(1) targets the act of circumvention and not the use of the materials after the circumvention has occurred); United States v. Elcom Ltd., 203 F. Supp. 2d 1111, 1123–25 (N.D. Cal. 2002) (explaining that an individual user is permitted to circumvent for the purposes of engaging in fair use, but that trafficking in tools that allow fair use circumvention is unlawful).

[249] *See, e.g.*, Kelly v. Arriba Soft Corp., 336 F.3d 811, 818–20 (9th Cir. 2003) (reasoning that a search engine's commercial use of thumbnail images of a photographer's portfolio was sufficiently transformative because it enhanced the public's ability to gather information without superseding the photographer's purpose for the original content).

[250] S. REP. NO. 105-190, at 43–45, 57–58 (1998).

Further, if news aggregators did not exist, individual fair use for the purpose of accessing, customizing, and organizing news content to stay informed would not be affected. The commercial news aggregator is not the only way for users to access, organize or customize news content for fair use purposes. Individuals retain these abilities because they can still use personal newsreaders or directly visit the news website.

As in *Elcom*, fair users will not be precluded from making fair uses of news content if commercial news aggregators are enjoined from marketing their services to consumers.[251] An injunction on news aggregators would not restrict an individual's ability to make fair use of news content by other means, such as simply registering with the site to access the content directly. It is, therefore, conceivable that a news website's 1201(a)(2(A) claim will not have to yield to the commercial news aggregators' fair use defense.

Ultimately, however, judges retain the power to interpret the statute in the context of the rules of statutory interpretation while continuing to draw upon the rich body of common law related to fair use. As Nimmer observed, judges adhering to a textualist view could theoretically defend a fair use exemption to the DMCA just as easily as judges wishing to discount it could invoke their common law powers to do so.[252]

V. Conclusion

The acute tensions between the rights of content producers and the fair use rights of users that dominated the conversation leading up to the enactment of the DMCA continues play out in parallel debates regarding online news content. Today, advancements in technology that permit the distribution of content on a pay-per-use basis have the potential to achieve a new balance between news content producers and users. The same technological advancements could permit the efficient administration of fair use exceptions on an individual basis.

The DMCA as currently drafted provides a legitimate way to prevent and remedy losses incurred by the news industry from the unauthorized distribution of its content. In particular, bypassing a news website's password protection scheme to automatically harvest news content may produce a valid 1201(a)(2)(A) claim against a commercial news aggregator. Many news websites already employ password-protected accounts with CAPTCHA routines to verify that the users are human. With or without CAPTCHA, these schemes are technological measures within the meaning of the DMCA.

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[251] *See Elcom*, 203 F. Supp. 2d at 1123–24.

[252] Nimmer, *supra* note 89, at 979–981.

News aggregators that bypass these routines to harvest content may be liable for circumvention under 1201(a)(2)(A) if such circumvention is demonstrably unauthorized. If a news aggregator used a legitimately issued password to access, harvest and republish a news website's content when such use was expressly prohibited in the site's terms of use, as had been done by the plaintiff in *Craigslist*, it would most likely be actionable under 1201(a)(2)(A) of the DMCA.

The Federal Circuit would require absence of authorization for use as well as circumvention for a DMCA claim to be sustained in favor of a news website plaintiff. The Second and Ninth Circuits, in contrast, would require absence of authorization for only circumvention for a DMCA claim to stand. In virtually all circuits a news aggregator's fetch and display technology is unlikely to rise to the level of circumvention of a news website's password protection scheme without the explicit withholding of authorization for such circumvention.

Fair use is unlikely to sustain a news aggregator's defense, especially in circuits where authorization is viewed as pertaining strictly to circumvention, *i.e.,* where authority to circumvent was not explicitly granted by the copyright owner. In circuits that interpret authorization to encompass authority for use, fair use may present a stronger defense. But where fair use of the material is not wholly limited by an anti-circumventing technology, courts generally are unlikely to find fair use to be unreasonably restricted.

If the fair use forces that prompted the news content horse to leave the barn can be efficiently managed through technology, deploying the DMCA to secure the barn door locks may become more commonplace in the news industry.