

LEAVE DRM ALONE: A SURVEY OF LEGISLATIVE PROPOSALS RELATING TO DIGITAL RIGHTS MANAGEMENT TECHNOLOGY AND THEIR PROBLEMS

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INTRODUCTION

It has become fashionable in some circles to complain that copy-protection technology threatens socially desirable notions such as privacy, free speech, and the ability to make "fair use" of portions of digital works such as CDs, DVDs, and electronic books.

Critics, many of them law professors and civil liberties groups, have proposed a wide variety of remedies in response. Those typically involve enacting new laws that would curb, regulate, or limit technology to which these critics object. Three bills have been introduced in the 108th Congress to target copy-protection technology, which also goes by the name of digital rights management (DRM).

At the same time, influential copyright holders seeking to popularize DRM have turned to Congress for aid as well. They have claimed an early victory in the form of the anti-circumvention sections of the 1998 Digital Millennium Copyright Act (DMCA). Now they want more. Not only have some members of Congress proposed banning computer technology without DRM embedded in it, but the Federal Communications Commission (FCC)

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says that some non-DRM compliant hardware will be illegal to sell beginning in mid-2005.

In this article, we survey both the pro-DRM and anti-DRM remedies and argue that both camps are mistaken. Each proposes a legal structure that is not sound policy and that would have negative economic consequences. Congress should remain neutral and refrain from setting industrial policy; it should bow out of the DRM debate and permit consumers to choose what is acceptable or not.

I. WHAT IS DRM?

Digital rights management is a general term that refers to technology-based protections that permit a rights holder to restrict a user's access to and control of digital content. One news article has described it as a "kind of invisible software lock securely bolted onto a song or movie A music label, for example, might let you download a song free and then listen to it for a day, but then require you to pay up to keep on listening."¹ Like a speed governor in your rental car that tops out at 95 mph, DRM can prevent you from using someone else's property as you see fit. Also like a speed governor, by prohibiting possibly-detrimental and economically inefficient misuses of another's property, it can result in lower prices for consumers.²

No copy protection scheme is perfect, of course. Many DRM systems have been circumvented by clever programmers. This threatens copyright holders who would like to release valuable content in protected digital form. Their worry: Thanks to perfect digital copies and the Internet, if even one copyright infringer bypasses DRM protection, the resulting unprotected content can be made available to millions of people on file-trading networks.

Recognizing this threat, large copyright holders turned to Congress in the 1990s to seek a legal backstop. After aggressive lobbying, Congress enacted the Digital Millennium Copyright Act (DMCA) in 1998.³ Section 1201 of the DMCA broadly restricts bypassing DRM technology or distributing software or hardware that "is primarily designed or produced for the purpose of

1. Nick Wingfield, *The New Digital Media: You Might Have It, But Not Really Own It*, WALL ST. J., Aug. 16, 2004, at B1.

2. Examples already abound. DVDs at neighborhood video stores typically use DRM to prevent unfettered copying. Some music companies are experimenting with encrypted audio CDs to limit customers' ability to freely redistribute the material online. Apple's iTunes music store sells songs for ninety-nine cents, with DRM permitting the song to be played on no more than five computers. Encrypted "electronic books" employ DRM to prevent customers from making printouts of the text without authorization, and so on.

3. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

circumventing” DRM technology or has limited alternative uses.⁴ The DMCA reinforces DRM’s technological protections with legal prohibitions.

Every disruptive technology draws criticism, and DRM is no exception. Critics have identified some legitimate concerns with DRM, saying it can curb fair use, limit access to material that has passed out of copyright and into the public domain, work in consumer-unfriendly ways, and require disclosure of personal information that could raise privacy concerns.⁵ The typical proposed solutions are new laws.

II. SURVEY OF DRM-RESTRICTIVE LEGISLATION

At least three bills introduced in the 108th Congress seek to place restrictions on DRM use. Senator Sam Brownback, a Republican from Kansas, is championing a proposal with the farthest-reaching DRM regulations called the Consumers, Schools, and Libraries Digital Rights Management Awareness Act which was introduced in September 2003.⁶ Brownback’s bill would ban the sale or importation of DRM-protected media unless it followed government regulations dealing with topics like whether the media could be resold or donated to a charity without restrictions.⁷

4. 17 U.S.C. § 1201(b)(A) (1994 & Supp. V 1999).

5. The arguments tend to go as follows: (1) DRM could prevent users from accessing public domain material that is encrypted, including material that has a recently-expired copyright. (2) “Fair use” of DRM-protected materials could be prohibited, depending on the way a DRM system is designed. News organizations, academics, or would-be parodists may no longer be able to expropriate a portion of copyrighted works for lawful purposes. Backups may not be allowed either. (3) Depending on how they are designed, DRM systems may require customers to disclose personal information such as a credit card number before access to the material is granted. In addition, each access could be logged by the copyright holder or its designee, raising privacy concerns. (4) Customers can be inconvenienced when technology acts in counterintuitive ways. Commercial DVDs bought in Japan generally do not work in U.S. players. DRM-enabled computer software configured for a laptop may refuse to work on a desktop machine in the same home.

6. Consumer, Schools, and Libraries Digital Rights Management Awareness Act of 2003, S. 1621, 108th Cong. (2003).

7. Brownback’s bill says: (1) It would be illegal for anyone to sell or distribute for free any “access controlled digital media product or a redistribution controlled digital media product” unless it sports a government-established label disclosing what DRM restrictions are embedded in it. 149 CONG. REC. S11569, 511574 (2003) (S.1621 § 4 (c)(1)). (2) Companies that employ DRM to protect their products must permit customers to donate “digital media products they own to educational institutions or libraries.” It also would be unlawful to import software from other countries unless it included those features. *Id.* § 6(b). (3) Nobody could create or import any digital media product protected by DRM unless it can be resold. The “lawful owner” must be able to “transmit a copy of that product by means of a transmission to a single recipient” as long as the original copy is deleted at the same time. *Id.* § 6(a).

The two other bills primarily focus on labeling. Representative Rick Boucher, a Democrat from Virginia, claims broad support for his Digital Media Consumers' Rights Act,⁸ including a pledge by a key committee chairman to secure a floor vote.⁹ Boucher's bill would create a complex web of regulations overseen by the Federal Trade Commission (FTC) that would govern DRM-enabled compact discs.¹⁰

Senator Ron Wyden, a Democrat from Oregon, is taking a broader approach not limited only to CDs. His Digital Consumer Right to Know Act says that any producer or distributor of copyrighted digital content that uses DRM must "disclose the nature of such limitations to the purchaser in a clear and conspicuous manner prior to such sale."¹¹ It lists eight categories, including DRM-restricted backup copies and fair use, that the FTC would regulate.¹²

III. OTHER PROPOSALS FOR REGULATION

Many commentators would go even farther than the bills in Congress. In the early days of the DRM debate, Mark Steftik suggested a Digital Property Trust (DPT) where issues of fair use could be decided.¹³ The DPT would be made up of stakeholders including lawmakers, consumers, libraries and rights-holders that would offer an arbitration and licensing service for fair use.¹⁴ According to Steftik, licenses from the DPT would come at a discount or be free for "certain kinds of works" and include fewer limitations on rights.¹⁵

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

9. Declan McCullagh, *The Hill's Property Rights Showdown* (June 22, 2004), at http://news.com.com/The+Hill's+property+rights+showdown/2008-1025_3-5243241.html.

10. Boucher's DMCRA prohibits selling or advertising a CD unless its packaging describes "minimum recommended software requirements for playback or recordability on a personal computer," "any restrictions on the number of times song files may be downloaded to the hard drive of a personal computer," and "the applicable return policy for consumers who find that the prerecorded digital music disc product does not play properly. . . ." Digital Media Consumers' Rights Act § 3-24A(c)(3)(A)-(C).

11. Digital Consumer Right to Know Act, 149 CONG. REC. S4326, 4327 (2003) (§ 3 (b)(1)).

12. *Id.* § 3.

13. Mark Steftik, *Shifting the Possible: How Digital Property Rights Challenge Us to Rethink Digital Publishing*, 12 BERKELEY TECH. L.J. 137 (1997).

14. *Id.* at 156.

15. Steftik envisioned that the DPT would interact with law enforcement agencies locally and globally to enforce fair use rights. *Id.* The entire DPT structure would be financed by contributions "from stakeholders" and from a small tax on individual DRM transactions. *Id.*

Julie Cohen and Dan Burk veer in a similar direction in their 2001 consideration of how an ideal DRM system should be designed.¹⁶ Cohen and Burk proposed a DRM system that has built-in “automatic defaults” for common fair use, and permits bypassing by certain authorized users for greater fair use.¹⁷ The key would be issued by an ostensibly impartial third party decision maker, such as the Library of Congress, who would make a case by case determination of whether the user’s proposed actions are reasonable.¹⁸ The system would penalize both users and rights holders who did not participate: Users who did not use the third party to obtain greater access, and instead used circumvention technologies, would be subject to suit, while rights holders who did not deposit keys would be unable to obtain legal protection for circumvention.¹⁹ Cohen and Burk acknowledge that their proposal is inferior to what is allowed under traditional fair use rights (it does not permit spontaneous fair use or protect a user’s anonymity), but call it a “second-best solution designed to make the best of a bad situation.”²⁰

Alfred Yen suggests that regulators consider the law of firearms regulation as a model for regulating technology that circumvents DRM.²¹ According to him, both gun laws and anti-circumvention laws such as the DMCA are a reasonable response to the misuse of technology.²² Yen argues that federal firearms law has features that could be borrowed, such as placing restrictions on who can buy circumvention technology.²³

Other commentators, such as Chad Woodford, would like new laws authorizing one federal agency or another to regulate DRM technology.²⁴ According to Woodford, the FCC should be authorized to draft regulations that ensure fair use and other user rights.²⁵ For example, the FCC could require

16. Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41 (2001).

17. *Id.* at 65-70.

18. *Id.* at 66.

19. *Id.*

20. *Id.* at 80.

21. Alfred C. Yen, *What Federal Gun Control Can Teach Us About the DMCA’s Anti-Trafficking Provisions*, 2003 WIS. L. REV. 649, 687.

22. *Id.*

23. Those include: Licensing those who make circumvention technology; requiring face to face sales by a licensed dealer who would record the identities of those who buy circumvention technology; prohibiting sales to minors (without adult supervision) and convicted copyright infringers; and restricting the methods by which circumvention technology is sold by requiring each individual device to have a serial number that would be imprinted on any file de-circumvented by the device. *Id.* at 659.

24. Chad Woodford, Comment, *Trusted Computing or Big Brother? Putting the Rights Back in Digital Rights Management*, 75 U. COLO. L. REV. 253, 291 (2004).

25. *Id.* at 291-93.

that works with expired copyrights be easily accessible through DRM. Woodford wants the FCC to ensure that DRM systems are designed for modular use, so that code can easily be swapped when necessary for regulatory purposes.

Compulsory licensing systems are also popular. For example, William Fisher of Harvard Law School likes the idea of a government-run licensing system that would essentially eliminate copyright restrictions such as making reproductions.²⁶ Under this plan, the government would compensate artists for making their works available by increasing the federal income tax as well as creating a new tax that would be levied on related goods and services. The compensation would be based on the type of use that was made of the media; this use would be tracked by a digital signature.²⁷ One peer-to-peer trade association has endorsed compulsory licensing.²⁸

IV. THE PATH TO MANDATORY DRM REGULATION

Influential copyright holders in the entertainment industry have been aggressive in pressing for legislation from Congress. Those groups include the large movie studios that comprise the Motion Picture Association of America (MPAA) and the major record labels represented by the Recording Industry Association of America (RIAA). Not satisfied with its ability to protect its members' content with DRM and restrict the distribution of circumvention tools with the DMCA, the MPAA proposed in 2001 that future PCs and consumer electronic devices be equipped with mandatory security devices.²⁹

That proposal solidified in the form of legislation introduced in 2002 by Senator Ernest Hollings, a Democrat from South Carolina, called the Consumer Broadband and Digital Television Promotion Act.³⁰ It prohibited the sale or manufacture of "digital media devices" without "standard security technologies" to be created through an industry working group or, if that were deemed insufficient, established by the FCC.³¹ The term "digital media device" was defined so broadly it swept in any hardware or software that "reproduces copyrighted works in digital form" or transfers it, which includes

26. See WILLIAM FISHER, *An Alternative Compensation System*, in PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT (2004).

27. *Id.*

28. Lisa Bowman, *Trade Groups to Back P2P Efforts*, CNET News.com, at http://news.com.com/2100-1027_3-1023545.html (July 7, 2003).

29. Declan McCullagh, *Hollywood Loves Hollings' Bill*, Wired News, at <http://www.wired.com/news/politics/0,1283,46671,00.html> (Sept. 11, 2001).

30. Consumer Broadband and Digital Television Promotion Act, S. 2048, 107th Cong. (2002).

31. *Id.* § 5(a).

almost everything with a microprocessor.³² The computer industry bitterly opposed Hollings' bill, and it stalled in the Senate.³³

In November 2003, the FCC took a major step toward some forms of mandatory DRM. In what has become known as the "broadcast flag" proceeding, the FCC said that starting in mid-2005, it will be illegal to sell or distribute any product that can receive certain digital TV streams, unless that product includes government-approved copy protection.³⁴ That has led the Electronic Frontier Foundation, a "fair use" advocacy group, to encourage Americans to build (or buy) a digital TV receiver without such restrictions before July 2005.³⁵ Some makers of PC cards have said they will no longer be able to sell their over-the-air digital TV receivers after that date.³⁶ As of March 2005, a lawsuit seeking to enjoin the FCC's broadcast flag rules was before the U.S. Court of Appeals for the District of Columbia Circuit and a decision was expected at any time.³⁷ Invoking the broadcast flag rule, the MPAA and the National Football League lobbied the FCC to ban a forthcoming product from TiVo that would let its customers receive digital broadcasts and share them with up to ten other TiVo units.³⁸ The FCC rejected the request.³⁹

The music industry is seeking similar treatment. In August 2004, the Walt Disney Company (which owns over seventy radio stations and four record labels) proposed that the FCC should consider extending mandatory DRM rules to radio.⁴⁰ The proposal suggested the FCC should also consider

32. *Id.* § 9(3).

33. The Senate referred the bill to the Committee on Commerce, Science, and Transportation. See Declan McCullagh, *Tech Firms Fight Copy-protection Laws*, CNET, News.com, Jan. 23, 2003, at http://news.com.com/Tech+firms+fight+copy-protection+laws/2100-1023_3-981882.html.

34. FCC, *IN RE* DIGITAL BROADCAST CONTENT PROTECTION, MB Docket No. 02-230, FCC 03-273 (Released Aug. 9, 2002), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-273A1.pdf.

35. Electronic Frontier Foundation, *High-Definition Personal Video Recorder's Introduction*, at <http://www.eff.org/broadcastflag/hdtv-introHY.php> (last visited Oct. 17, 2004).

36. Declan McCullagh, *Are PCs next in Hollywood Piracy Battle?*, CNET, News.com, Nov. 5, 2003, at http://news.com.com/2100-1028_3-5103305.html?tag=nefd.pop.

37. *Am. Library Ass'n v. FCC*, No.04-1037, 2005 U.S. App. LEXIS 4239 (D.C. Cir. Mar. 15, 2005).

38. See *Hollywood, NFL Fight TiVo Sharing*, ASSOC. PRESS, July 22, 2004, at <http://www.wired.com/news/digiwood/0,1412,64314,00.html?tag=nefd.pop>.

39. Declan McCullagh, *FCC Lets TiVo Users Share Shows*, CNET News.com, Aug. 4, 2004, at http://news.com.com/2100-1041_3-5296756.html.

40. COMMENTS OF THE WALT DISNEY CO. & ABC INC., *IN RE* DIGITAL AUDIO BROADCASTING SYSTEMS AND THEIR IMPACT ON THE TERRESTRIAL RADIO BROADCAST SERVICE, FCC Docket No. 99-325, Aug. 2, 2004, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516286422.

whether to extend the rules to “all music distribution platforms, including satellite digital audio radio service, the internet and broadcast radio service,” and noted that “Disney supports the continued and expeditious consideration of a digital radio content protection mechanism.”⁴¹ Disney did not list details, but the implications of its request would be to ban certain radio receivers or computer software that did not adhere to mandatory DRM rules.

V. NO LEGISLATION IS GOOD LEGISLATION

Taken as a whole, these proposals add up to a dizzying array of suggestions that would establish novel and expensive regulatory superstructures in federal agencies ranging from the FCC to the Library of Congress. Perhaps the income tax could be raised, the argument goes,⁴² or software and hardware banned if it does not comply with the personal predilections of a certain commentator or interest group.⁴³ With equal certitude, both boosters of DRM technology and its skeptics insist that their proposed fix is the only one that makes sense. About the best that can be said is that, with a few exceptions, they remain merely proposals without the force of law.

What these schemes have in common is that they would, to a greater or lesser degree, transform one of the least regulated U.S. industries into a much more regulated one in which inventors might have to seek permission from the government before creating new products. It is no coincidence that the lightly-regulated information technology industry represents only about 8 percent of the U.S. gross domestic product but accounts for about 29 percent of its growth.⁴⁴ These proposals typically would inject the government in the technology standards-setting process without any evaluation of whether the costs to the general public outweigh the benefits. That price tag could be high: Economist David Friedman calculates that when a function is performed by the government as opposed to private actors, it costs two to three times as much.⁴⁵

41. *Id.* at 3-4.

42. As in Fisher’s compulsory licensing model. FISHER, *supra* note 26.

43. See Bowman, *supra* note 28.

44. INFORMATION TECH. INDUS. COUNCIL, THE IT INDUSTRY DRIVES ECONOMIC GROWTH, MORE THAN ANY OTHER SECTOR, at http://www.itic.org/reports/economy/tax_growth.htm (last visited Feb. 28, 2005) (document developed in conjunction with Economic Strategy Institute).

45. See DAVID FRIEDMAN, MACHINERY OF FREEDOM, GUIDE TO A RADICAL CAPITALISM 30-95 (1973).

Perhaps more alarmingly, either DRM camp would likely erect a permanent regulatory infrastructure that would become an even more tempting target for lobbying and special-interest pressure. Copyright law already is such a creature, of course, with its web of statutory licensing schemes, Byzantine regulations from the Copyright Office, and rules that spell out the minutiae of how Internet providers must comply with notices of copyright infringements. But recognizing a flawed situation is no argument for making matters worse.

Pam Samuelson says copyright law suffers from a serious public choice problem: the benefits are concentrated in certain industries or special interest groups, while the costs are distributed over the public at large.⁴⁶ William Landes and Richard Posner have identified “interest-group pressures that favor originators of intellectual property over copiers,”⁴⁷ though interest groups representing the fair use and library community presumably would like to secure sufficient political influence to reverse the current balance of power. Federal agencies always are subject to regulatory capture by special interest groups, and ones that would be tasked with overseeing DRM rules would be anything but immune. Shifting decisions from the marketplace to the political arena would require politicians or bureaucrats to substitute their own judgment or personal preference for that of tens of millions of individuals making up their own minds, with full knowledge of their own situation, about what is best for them.

Bringing DRM technology further under the purview of copyright law raises the stakes still higher. Silicon Valley companies and other hardware and software makers whose products could be severely regulated would have a tremendous incentive to devote more resources to influencing policymakers, either as a defensive measure (to preserve their current ability to innovate) or as an offensive measure (to ensure that their products will be permitted but rivals’ offerings will not). That raises the possibility of costly, interminable political battles that could shape the future of digital media more than the technology itself.

We propose a more modest alternative: the policy of the federal government should be neutral toward DRM technology. Put more simply, it should be left alone, to fail or to flourish on its own merits. Congress should not side with either large copyright holders seeking laws mandating DRM or

46. Pamela Samuelson, *Toward a New Politics of Intellectual Property*, Address at the 2002 World Wide Web Conference (May 10, 2002) (outline available at <http://www2002.org/samuelson.pdf>).

47. WILLIAM M. LANDES & RICHARD A. POSNER, *THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW* (AEI-Brookings Joint Center for Regulatory Studies, 2004), available at http://www.aei.org/docLib/20040608_Landes.pdf.

the academic and fair use community members who seek laws restricting DRM. Scarce resources should be spent on technological innovation rather than the zero-sum game of political influence.

DRM technology may prove to be a success in the marketplace; it may not. We remain agnostic. Certainly there are strong arguments showing that consumers can benefit. Reduced piracy means greater economic incentive to make content available in digital form, and perhaps add indexes, categories, and background material to public domain material that might not otherwise exist. Apple Computer would not have been able to ink deals with as many record labels if it did not include DRM in its iTunes music store and the iPod handheld player. DRM can lower the transaction costs for rights holders to enforce their copyright, and permit economically efficient price discrimination. It also could—though whether this will actually happen is anything but clear—help to curb piracy on peer-to-peer networks like Kazaa and Morpheus.

At the same time, consumers have shown themselves willing to reject DRM technologies that are too intrusive. Industry experiments with copy-protection schemes have faltered in the past. Copy protection was wildly popular among software vendors in the 1980s, but fell out of favor after hard drives replaced floppy drives, rendering anti-copying technology more burdensome. In the late 1990s, Circuit City attempted a pay-per-view variation of DVD known as Divx, but quickly shuttered the experiment when customers failed to materialize.⁴⁸ More recently, music labels have issued DRM-protected CDs that have led to complaints from some customers over incompatibility with some CD players. Few CDs are DRM-enabled, which indicates that companies are cautiously evaluating consumer acceptance. Apple's iTunes appears to be a success in no small part because its DRM is minimally intrusive, and in fact became even more flexible over time.

It is reasonable to conclude that consumers will continue to be cautious when it comes to buying products with DRM, unless it is clear that the benefits (such as lower prices or more features) outweigh the costs. Anecdotal evidence suggests this is an ongoing process in which the normal marketplace forces are working. One Internet discussion board, for instance, describes the outcry from video game purchasers when a DRM scheme became too intrusive.⁴⁹ A 2002 news article reported that "Microsoft has bowed to

48. Margaret Kane, *Divx dies--DVD the big winner*, ZDNet News, June 15, 1999, at http://news.zdnet.com/2100-9595_22-514913.html.

49. *When does copy-protection become too much?*, cdfreaks.com, June 24, 2003, at <http://www.cdfreaks.com.news/7397>.

So, when is protection too much? Answer; when it degrades compatibility to a point where a high majority of users are unable to use a product. JoWood's forum has been flooded with messages from users and rumours of game stores reporting returned

consumer pressure” and pulled back from a controversial plan that would have encrypted TV shows recorded on certain PCs.”⁵⁰

This is not to say that no law should regulate DRM technology. Knowingly false representations of compatibility with software or hardware can be punished as fraud, and state attorney generals have demonstrated that they are eager to prosecute high-tech scofflaws. Under its existing statutory authority, the FTC has the power to punish unfair or deceptive trade practices. Firms like Microsoft and DoubleClick can attest that both Republican and Democratic chairmen of the FTC are willing to use that authority to target technology companies with questionable business practices on the Internet.

For the government to remain truly neutral on DRM, of course, section 1201 of the DMCA would have to be modified to permit circumvention unless it is being done as part of an actual act of copyright infringement. Two bills in Congress, the BALANCE Act of 2003⁵¹ and the Digital Media Consumers’ Rights Act,⁵² propose to do, in part, just that.

The U.S. is a signatory to the World Intellectual Property Organization (WIPO) treaty that requires anti-circumvention laws.⁵³ But other nations have shown that it is possible to be more flexible than the DMCA currently permits. Japan has ratified the WIPO treaties and enacted laws that deal with anti-circumvention of DRM.⁵⁴ These laws do not prohibit the manufacturing of

games due to the installation failing its CD check.

Id.

50. Joe Wilcox, *Microsoft Nixes TV Copy Protection*, News.com, Oct. 9, 2002, at http://news.com.com/2100-1040_3-961376.html?tag=nefd.pop.

51. Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003, H.R.1066, 108th Cong. (2003).

52. Digital Media Consumers’ Rights Act of 2003, H.R. 107, 108th Cong. (2003).

53. See WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65, art. 6, [hereinafter WCT]; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M.76, arts. 8 & 12, [hereinafter WPPT].

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

WCT, art. 11.

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

WPPT, art. 18.

54. See Japanese Copyright Law, Law No. 48 of 1970 art. 1, available at

anti-circumvention devices, nor do they prohibit their use.⁵⁵ Only the trade in anti-circumvention devices is illegal and punishable through criminal sanctions.⁵⁶ According to some commentators, Japanese copyright law tries to keep the acts of access and copying separate, with the copyright law not addressing access circumvention at all.⁵⁷

Defanging section 1201 of the DMCA likely would go a long way toward defusing arguments that say DRM technology should be restricted because the pendulum of copyright law has swung too far in the direction of rights holders and unduly restricts fair use. If section 1201 were amended, this argument would be trivial to reject. As the only appellate court to explore the topic in detail has concluded, “We know of no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original.”⁵⁸ In addition, as another commentator has pointed out, “the application of DRM technology to regulate access does not infringe any other persons’ rights, for the simple reason that the public at large has no free standing right to gain access to a creative work.”⁵⁹

As long as the government permits it, consumers will be the ultimate arbiter of whether DRM technology is acceptable or not. Consumers may embrace DRM. They may reject it entirely. Or they may reject it initially, prompting media firms to respond with a second and third round of increasingly flexible products. This important process should not be short-circuited before it can truly begin.

http://www.cric.or.jp/cric_e/clj/clj.html; Japanese Anti-Unfair Competition Law, Law No. 47 of 1993.

55. See Dr. Ian R. Kerr et al., *Technical Protection Measures: Tilting at Copyright's Windmill*, 34 OTTAWA L. REV. 7, 60 (2002/2003).

56. *Id.*

57. *Id.*

58. Universal City Studios, Inc. v. Corley, 273 F.3d 429, 459 (2d Cir. 2001).

59. John Cahir, *The Moral Preference for DRM Ordered Markets in the Digitally Networked Environment* (2004), at <http://www.copyright.bbk.ac.uk/contents/publications/workshops/theme1/jcahir.pdf>.