

Fair Use and US Copyright Law: The Changing Definition of “Fair”

This outline is intended to be a brief review of some of the more significant legal developments in the United States dealing with the legal defense of “fair use” under US copyright law. The information contained in this outline should be considered as merely a snapshot view of present US protection trends in the area. It is intended to discuss some of the most important developments in the law, but is *not* intended to be a comprehensive discussion of all the issues and cases in the area. It is also *not* intended to take the place of consultation with qualified lawyers regarding the application of US law to any particular action or situation.

A General Introduction

Under US copyright law, copyright protection is extended to “original works of authorship fixed in any tangible medium of expression now known or later developed from which they can be perceived, reproduced or otherwise communicated...” (17 U.S.C. §102(a)) Copyright protection does not extend to “any idea, procedure, process, system, method of operation, concept, principle or discovery.’ (17 U.S.C. §102(b)) In essence, so long as a work has been recorded, filmed, written or otherwise set out in a tangible form, it may be subject to protection under US copyright law. Consequently, literary, dramatic, musical, artistic or other intellectual works, including original collections of information may be protected. Thus, under US copyright law, such diverse works as computer software, paintings, choreography, maps, poetry and sound recordings may be protected so long as such works are “original” and contain “expression.” Such protection applies to both published and unpublished works. Furthermore, no registration or notice on the work is required for the work to be protected. Instead, creation of the work alone is sufficient.

Upon the creation of a copyright protectable work the author (or copyright owner) is entitled to a bundle of six rights. These rights include the exclusive right to do or authorize the following acts:

- The right to reproduce, in whole or in part, the work in copies;
- The right to prepare derivative works based upon the original;
- The right to distribute copies of the work to the public;
- The right to perform the work publicly;

- The right to display the work publicly;
- In the case of sound recordings, the right to perform the work publicly by means of a digital audio transmission.

While copyright registration is not required for protection, US authors are required to register their works before seeking legal relief for infringement. . Copyright registration is controlled by the US Copyright Office and can be done over the Internet. Moreover, where litigation is imminent, registration may be obtained on a expedited basis. In order to prove copyright infringement, a plaintiff must prove the following

- That he is the copyright owner;
- That the work is copyright protected
- That the copyright in the work has been infringed.

For example, if the claim is that the work has been reproduced without authorization, then the copyright owner must demonstrate that the work has been copied without permission. Such copying does not have to be verbatim to qualify as infringement. Instead, it is sufficient if an ordinary observer would consider the expressive elements “substantially similar.”

US Copyright law provides for a complete panoply of remedies for copyright infringement, including injunctive relief, seizure and destruction of the infringing copies as well as all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which infringing copies or phonorecords may be created, actual damages (including lost profits), statutory damages, up to \$150,000 per infringement for willful infringement., costs and reasonable attorneys’ fees. The parties that may be held liable for copyright infringement include the party which committed the infringing act (referred to as a “direct infringer”), the party which knew of the infringing activity and induces, causes or materially contributes to it (referred to as a contributory infringer) and the party which has the right and ability to supervise the parties engaged in the infringing activities and who had a direct financial interest in the exploitation of the copyrighted material (referred to as “vicarious liability”).

One of the most significant defenses to a claim of copyright infringement is the defense of “fair use.” To consider whether an unauthorized use of a copyrighted work qualifies as a fair use, courts consider the following four statutory factors. They are:

- The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- The nature of the copyrighted work;
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- The effect of the use upon the potential market for or value of the copyrighted work.

(17 U.S.C. §107) These factors are not exclusive. Instead, courts often consider additional factors, including whether the use in question is protected under the First Amendment’s free speech protections, or whether it qualifies as a “transformative” use of the original work.

Anti-Circumvention Devices

Under the Digital Millennium Copyright Act (DMCA) making or selling devices or services that are used to circumvent technological measures to prevent either unauthorized access or unauthorized copying of a copyrighted work are prohibited if such devices or services are primarily designed or produced to circumvent “technological protection measures.” The trafficking, manufacturing, importing or offering to the public such devices and services is also prohibited. (17. U.S.C. §1201)

Section 1201 of the 1976 Copyright Act (amended) prohibits the circumvention of technological protection measures designed to control access to a copyrighted work (17 USC § 1201(a)) or to protect “a right of a copyright owner.” (17 USC § 1201(b)) To qualify for protection the technological measure in question must be “effective.” Effectiveness, however, does not mean that the measure must be perfect or nearly impossible to break. Instead, it is sufficient if the measure “actually works” when decryption programs or other circumvention measures are absent.

(See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp.2d 294 (SDNY 2000), *aff'd on other grounds sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001))

In addition to prohibiting the actual circumvention of technological protection measures, the Act also prohibits the manufacture, importation, offering to the public, provision or other “trafficking” “in any technology, product, service, device, component or part that is primarily designed or produced for the purpose of circumventing a [protected] technological protection measure.” (17 USC §§ 1201(a) & (b))

While the statute provides numerous statutory exceptions, it does not, however, provide a categorical exception for “fair use” activities. Thus, for example, a teacher who seeks to circumvent technological protection measures for the purpose of obtaining materials to use in teaching activities is not excused from compliance, even if such act would qualify as a fair use under traditional copyright principles.

This lack of a “generic” fair use defense for purported circumvention violations has created the greatest challenge to the continued viability of the anti-circumvention provisions of the DMCA. Present bills before Congress would add such a generic exception to the Act. (See, e.g., Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003, HR 1066)

It should be noted that the provisions of the DMCA that provide limited protection from liability for copyright infringement by certain ISP's discussed above does *not* apply to claims regarding the trafficking, etc. circumvention products and technologies. In addition, although reverse engineering is allowed under the statute, circumvention of existing technology is prohibited except in the limited circumstance of reverse engineering for the purpose of achieving interoperability.

One of the most recent cases which dealt with the scope of protection available under the DMCA for technological protection measures is *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001). In this case the court dealt with the liability of Shawn Reimerdes, better known as Emmanuel Goldstein, who runs a website that published decryption technology for DVD's. Most works placed on DVD's are protected by a

copy protection technology called CSS which is designed to prevent the unauthorized copying of motion pictures in DVD format. Decryption technology, called DeCSS, circumvents the CSS-protected motion pictures on DVD's and allows end users to reproduce the motion pictures contained on such copy-protected discs. Reimerdes made this DeCSS available on the Internet through his website and by linking his website to the same information contained on other websites. Reimerdes was sued by eight major United States motion picture studios. In addition to dealing with the question of liability under the DMCA's anti-circumvention prohibitions, the court also had to face issues raised by the defendant's defense under the First Amendment (free speech). The court held that defendant had violated the DMCA and enjoined the defendant from both publishing the decryption information as well as linking its site to others that posted the DeCSS code. The court further rejected the defendant's free speech defense on the grounds that computer code did not qualify as speech.

Temporary Copies

US copyright law has recognized that any temporary copy of a copyrighted work created in a computer environment qualifies as a reproduction for which permission is required from the copyright owner.

In its seminal decision, *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), the Ninth Circuit Court of Appeals held that a temporary copy created by booting a program into the Random Access memory of a computer qualified as a "copy" for which permission to reproduce the work was required by the copyright owner, even though the copy was not permanently "fixed." The court held that no permanent fixation was required since the definition of "copies" under the 1976 Act (as amended) is "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device," Since a person can load the software in question and then view the program, such reproduction was sufficiently permanent or stable to qualify as an unauthorized reproduction under the Act.

In. *Religious Technology Center v. Netcom On-Line Communications Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), the court addressed what constitutes infringing reproductions in the context of the storage of digital information. Relying on the *MAI* case, the court held that “there is no question that after *MAI* that ‘copies’ were created, as [the user’s] act of sending a message.... caused reproductions of the plaintiff’s works.” Ultimately, the court held that the display of recognizable copies through a computer was sufficiently permanent to constitute a copy under the Copyright Act.

Napster, Kazaa and Other “Facilitators”

Those parties which induce others to commit pirate activities may be liable for contributory copyright infringement. The most obvious “facilitators” who may be a target of a lawsuit are those who distribute software allowing peer to peer file transfers such as Kazaa and Napster. Under US law, a doctrine referred to as “the *Sony* doctrine” may present a serious limitation to the success of an action against any such third party facilitators.

Briefly in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984), the Supreme Court found that the manufacturers of video cassette recorders used to record broadcast television programs for time-shifting purposes were not liable contributory copyright infringement because such recorders were a staple article of commerce which has substantial non-infringing uses. Such non-infringing uses include the ability to engage in the reproduction of public domain materials, and the fair use reproduction of copyrighted works. Developed in the days of analog recording, the application of the *Sony* doctrine to those who facilitate unauthorized P2P file trading of copyrighted works is presently unclear.

The *Sony* defense has been held inapplicable in cases involving anti-circumvention violations. (See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp.2d 294 (SDNY 2000), *aff’d on other grounds sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001)(based on legislative history, court holds *Sony* doctrine does not apply to anti-circumvention provisions, although it remains a viable defense to contributory copyright infringement.)) Some courts have refused to use

the *Sony* doctrine to excuse those who provide P2P software from contributory liability for the massive infringement that results from the easy and unsupervised availability of P2P file trading.

One of the largest technology based lawsuits in the United States in recent years was *A&M v. Napster*, 239 F.3d 1004 (9th Cir. 2001). The defendant, Napster, was engaged in the facilitation of peer to peer file trading of digital music files. In the late 1990's Napster ran a website that offered free downloadable copies of its software. This software allowed individuals to download musical compositions and sound recordings of copyrighted artists in MP3 format. It also allowed users to search and download MP3 files from any other user who is logged onto the Internet. In addition, Napster operated a search index which facilitated the searching and peer to peer transfer of digital music files between users. Napster argued that its actions did not qualify as copyright infringement since they merely facilitated the sharing of digital files. Alternatively the defendant argued that its actions were protected under the doctrine of fair use. The court rejected defendant's arguments and held that Napster's activities qualified as contributory copyright infringement. Moreover, since the end user's activities did not qualify as fair use, Napster's activities were not excused. The court ultimately held that Napster's actual knowledge of the infringing nature of its end users' acts vitiated any defense under *Sony*.¹

By contrast, in *Metro Goldwyn Mayer Studios, Inc. v. Grokster, Ltd.*, 289 F. Supp.2d 1029 (C.D. Cal. 2003), the court found that the providers of P2P software could *not* be held liable for contributory infringement because they lacked "actual knowledge" of the infringing uses at the time that the end users downloaded the software in question. Similar to the Napster case, the Grokster decision involved the supplying the of free P2P file trading software. However, unlike Napster, the facilitators in Grokster provided no search index and did not interpose themselves in the file transfer of end users beyond providing the software that allowed such file trading. Rejecting plaintiffs' claim for contributory copyright infringement, the court in *Grokster* emphasized that, unlike Napster, the facilitators in the *Grokster* case did not provide the "site and facilities" for its end users' infringing actions. The architectural differences between Grokster and Napster, in particular the fact that the software at issue "communicates

¹ See also *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003).

across networks that are entirely outside the defendant's control" and the absence of a centralized file indexing system were considered critical distinctions.

In *UMG v. MP3.com*, 2000 US Dist LEXIS 13293 (S.D.N.Y. 2000), the defendant created an Internet service that allowed the public to download and copy MP3 music files from their web site. The defendants alleged that they were merely engaged in the act of space shifting since they purportedly only allowed access to those digital files for which a user already owned a CD ROM copy of the song. The evidence, however, did not support this contention. Furthermore, the defendant had not obtained permission from the copyright owners of the songs in question to make the copies accessible by users. Having decided that the defendant had therefore infringed the plaintiff's rights, in this reported decision, the court determined what level of damages would be appropriate to compensate the plaintiffs. The court held that the defendants' actions were willful and wanton and held that statutory damages in the amount of \$25,000 per CD infringed would apply.

In *RIAA v. Diamond Multimedia Systems*, 180 F. 3d 1072 (9th Cir. 1999), the plaintiff sought to enjoin the defendant from manufacturing, selling and distributing the Rio. The Rio is a small device that allows a user to download MP3 audio files from a computer and listen to them, thereby increasing the portability of such files. Finding that the Rio is not capable of making copies from digital "transmissions," but instead, can only make copies from a computer hard drive, the court held that the Rio is not a digital audio recording device within the meaning of the Act. Consequently, defendant did not have to comply with statutory requirements that a "digital audio recording device" conform to the Serial Copy Management System (SCMS).

In a case involving streaming video technology, the court in *RealNetworks v. Streambox*, 2000 US Dist LEXIS 1889 (D.Wash. 2000), held that plaintiff's streaming video VCR violated the DMCA but not its ripper, used to translate file formats. The plaintiff marketed various products that allowed end users to access audio and video content over the Internet through a process known as streaming. This process generally leaves no copy of the streamed work on the user's file. Plaintiff's products contained a copy protection measure which assured that only those files which the copyright owner has granted permission to be copied can be

copied during the streaming process (referred to by the parties as a “secret handshake” and “copy switch” technology). Defendant’s Streambox VCR did not incorporate this copy protection technology such streaming music files using plaintiff’s RealMedia format. The court found that the Streambox VCR violated the DMCA’s anti-circumvention prohibitions by failing to include these security measures. It rejected defendant’s fair use defense, as well as defendant’s contention that plaintiff’s technology was not “effective.” By contrast, however, it accepted defendant’s fair use defense in connection with its “ripper” technology. This technology was used to translate files between various formats, including RealMedia, MP3 and . WAV. The court found that the RIPPER did not violate any anti-circumvention technology because the RealMedia format did not qualify per se as “technological protection measure” under the statute.

“The fortunes of the law of copyright have always been closely connected with freedom of expression, on the one hand, and with technological improvements in means of dissemination, on the other. Successive ages have drawn different balances among the interest of the writer in the control and exploitation of his intellectual property, the related interest of the publisher, and the competing interest of society in the untrammelled dissemination of ideas.” (*Sony Corp. v. Universal City Studios, Inc.* 464 U.S. 431 n. 12 (quoting foreword to B. Kaplan, *An Unhurried View of Copyright* vii-viii (1967)).

(d) There is a debate over the precise relationship between copyright and the First Amendment. Some commentators claim that copyright deserves no special treatment and should be subject to the same restrictions against prior restraints as libelous or defamatory speech. These commentators reject that the property values contained in copyright require any different treatment. Treating the consumption of intellectual property as “non-rivalrous” (“one person’s use does not prevent others from using it as well”), the content that unauthorized use does not cause irreparable harm and that, therefore, the property analogy has no effect. Some even go so far as to suggest that IP isn’t even property.

Finally, although the Patents and Copyrights Clause pre-dates the First Amendment, they claim that the Bill of Rights was designed to restrain the federal government in the exercise of its enumerated powers and that, therefore, the First Amendment can be used to restrain the exercise of Congress's power under the copyright clause. (Mark Hemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 *Duke L. J.* 147 (1998)).

- (e) *Harper & Row* suggests that there is no conflict between copyright and free speech. “[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas” at 558. The Court went on to indicate that the “idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.” At 556. It also indicated that fair use affords considerable “latitude for scholarship and comment.” At 560.

2. Critical First Amendment Issues

- (a) The first issue that has to be addressed is the purpose of copyright versus free speech.
 - (1) Arguably copyright and its support of the creation of new works supports First Amendment goals of an educated citizenry.
- (b) The second key question is whether “speech” necessarily includes “expression.” Put another way, does “free speech” necessarily demand free use of copyrighted “expression.”
 - (1) The court in *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001), held that computer

code and programs qualified as “speech.” The court held that “conveying of information” renders programs “speech” for purposes of 1st Amendment analysis.

- (2) In *DVD Copy Control Assn. v. Bunner*, 113 Cal. Rptr 2d 338, 60 U.S.P.Q. 1803 (Cal. Ct. App. 2001), did not engage in any attempt to dissect the DeCSS code into speech and function. Instead it held that having disclosure of DeCSS “can fairly be characterized as a prohibition of “pure speech.”
 - (3) In appellate decision, *DVD Control Ass’n Inc. v. Bunner*, 2003 WL 21999000 (Cal. S. Ct. 2003), held that computer code fell within the 1st Amendment because computer code “is an expressive means for the exchange of information and ideas about computer programming.” It did not dissect information from function.
- (c) The third question is the level of scrutiny that should be extended to free speech restrictions.
- (1) In *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001), the court treated the anti-circumvention provisions of the DMCA were content neutral. It reached this conclusion, however, by considering the functional (non-informational) capacity of the code at issue. Since the restriction was aimed at the *function* of the code [decrypt CSS] and *not* “speech” then the DMCA regulation is content neutral “just as would be a restriction on trafficking in skeleton key identified because of their capacity to unlock jail cells, even though some of the keys happened to bear a slogan or other legend that qualified as a speech component.”

- (2) If a regulation is content neutral, it must serve a substantial governmental interest, the interest must be unrelated to the suppression of free expression, and the incidental restriction on speech must not burden substantially more speech than is necessary to further that interest. (*Turner Broadcasting*, 512 U.S. at 662.
- (3) In *Corley*, 273 F.3d 429, the court found that DMCA's anticircumvention prohibitions were constitutional, accepting that "[t]he Government's interest in preventing unauthorized access to encrypted copyrighted material is unquestionably substantial." The court rejected any need for adopting the least restrictive alternative.
- (4) In *DVD Copy Control Assn. v. Bunner*, 2003 WL 21999000 (Cal. St. Ct. 2003), the court held that the California Uniform Trade Secret Act was a content neutral regulation. Although an injunction must refer to the content of the trade secret to specify the information to be protected, such an injunction is content neutral "so long as it serves significant governmental purposes unrelated to the content of the proprietary information." Finding that the regulation did not involve government censorship or government favoritism among different viewpoints it found the Act content neutral.
- (5) Under *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), in evaluating a content-neutral injunction, the test is whether the challenged provisions of the injunction "burden no more speech than necessary to serve a significant government interest."
- (6) In *DVD Control Assn. v. Bunner*, 2003 WL 21999000(Cal. S. Ct. 2003), that court found that

the limited property right of a trade secret “like patent and copyright law, trade secret prompt[s] the independent innovator to proceed with the discovery and exploitation of his invention.” Moreover, it rejected the argument that speech trumps property right: “[t]he mere fact that Bunner ‘claims an expressive . . . purpose does not give [him] a First Amendment right to “appropriate[e] to [himself] the harvest of those who have sown.”

- (7) In *United States v. Elcom Ltd.*, 202 F. Supp. 2d 1111 (ND Cal. 2002), the court also rejected strict scrutiny for the DMCA’s anti-circumvention provision. Finding that the anti-trafficking provisions do “not target speech” but were instead directed toward the functional nature of the code at issue, the court found that such functionality required intermediate scrutiny. Under the *Turner Broadcasting* test the substantial government interests unrelated to speech were identified as preventing the unauthorized copying of copyrighted works and promoting electronic commerce (by providing “new and powerful ways for the creators of intellectual property works available to legitimate consumers in the digital environment.” (quoting M. Rep. No. 105-551 at 23 (1998)). The court rejected the need for Congress to have adopted more narrowly tailored solutions such as increasing penalties for infringement or criminalizing the use of the Internet to distribute infringing copies (not workable) in my opinion or even more narrowly tailored.

6. The Supreme Court in *Eldred v. Ashcroft*, ____ U.S. ____ (2003), appeared to support this analysis. The majority relied

on the existence of the merger doctrine and fair use to reject a First Amendment attack on the CTEA. In rejecting the Petition's claim that removing works from the public domain violated the free speech clause, the Court emphasized that the close proximity in time between adoption of the Copyrights and Patents Clause and the First Amendment "indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles." Relying on *Harper & Row*, the Court noted the role of the ideal expression dichotomy and fair use in balancing copyright and free speech concerns. The Court specifically rejected (perhaps indicate?) the applicability of *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (the "must carry" decision). The CTEA "does not oblige anyone to reproduce another's speech against the carrier's will." "The First Amendment securely protects the freedom to make – or decline to make – one's own speech . . ." It did, however, recognize that copyrights are *not* "categorically immune from challenges under the First Amendment." But did not indicate precisely when such challenges arise. It did, however, indicate that when congress "alters the traditional contours of copyright protection" might "further First Amendment scrutiny" be necessary. ("But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.") This leaves open a possible challenge under the DMCA since such provisions clearly alters "traditional contours."

7. First Amendment challenges under copyright seem to take various forms. They include:
 - (1) Challenges that suppressing a work violates First Amendment rights because it chills speech.
 - (a) Such challenges have usually been unsuccessful. Thus, for example, in the court treated the free speech issue as a plus factor in deciding a fair use defense was unsuccessful.

- (2) In *Universal City Studios Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001), the court rejected Appellants claim that fair use of DVD movies is constitutionally required by copying the original work in its original format. “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. ... The fact that the resulting copy will not be as perfect or as manipulatable as a digital copy obtained by having direct access to the DVD movie in its digital form, provides no basis for a claim of unconstitutional limitation of fair use ... 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.”
- (3) Challenges that removing works from the public domain chills speech.
 - (a) This issue was raised in *Eldred v Ashcroft* _____ U.S. (2003). The Court rejected this claim on the grounds that copyright term extension does not alter traditional contours of copyright and do not alter the balance between free speech and copyright struck by Congress under the fair use doctrine and the idea/expression dichotomy. The Court, however, did not precisely reject this particular claim, since it did not address the issue head on.
 - (b) Similarly in *Golan v. Ashcroft* _____ (D. Colo. 2001), a conductor of a small college orchestra that must now pay royalties for works by Shostakovich, Prokofiev and others who were restored to copyright status under Section 104A Challenged the Act on first amendment grounds. It is not clear to what extent Eldred will be used to eliminate this claim as well.

(4) Challenges that technological protections under the DMCA remove items from the public domain and _____ speech. This is often combined with a challenge that the DMCA prohibits speech because it does not allow the dissemination of code or other “devices” that circumvent copy protection technology.

(5) Challenges that any restriction or uses of copyrighted materials violates free speech.

(a) This is a massive overstate of 1st Amendment principles because it equates the right to speech with the right to use anyone’s expression. At its most absolute, it supports piracy on the simple ground that such piracy is protected speech. The argument was apparently made by some Amici in the Verizon case and properly rejected by the district court (admittedly in dicta). In re *Verizon Internet Services*, Civil Action Bi, 92-ms-0323 (Subpoena Enforcement Matter in *RIAA v. Verizon Internet Services*) (D. DC 2003) (January 21, 2003).

(b) Similarly, the Court in *Eldred v. Ashcroft* _____ U.S. ____ (2003) rejected such an overbroad view, citing the co-related goals of copyright and free speech, as well as the idea-expression dichotomy and fair use doctrines.

8. Generally applicable laws do not offend the First Amendment simply because their enforcement against the press can incidentally affect the ability to gather and report the news (*Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991)). See also *Zacchini v. Scripps-Howard Broadcasting Co.*, 443 U.S. 562 (1977); *San Francisco Arts & Athletics v. U.S. Olympic Committee*, 483 U.S. 522 (1987). Thus, in *Chicago School Reform Board of Trustees v. Substance Inc.*, _____ (ND Ill. 2000), the court held that the First Amendment did not permit

the unauthorized publication of copyrighted tests in a newspaper even though the motive was to stir public debate.

9. The First Amendment does not prevent an author from handling all of his works during the term of copyright. Thus, the unauthorized publication of a religious work which the church had no present intention of publishing did not qualify as a fair use on First Amendment grounds. (*Worldwide Church of God v. Philadelphia Church of God* _____ (9th Cir. 2000)). This case is interesting because it addresses free speech from the point of a right *not* to speak.
10. The DMCA anti-circumvention provisions do not violate the First Amendment in prohibiting the dissemination of speech. In *Universal City Studios Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), the court rejected a claim of free speech impediment for the application of the DMCA anti-circumvention provisions to prohibit dissemination on a website of a computer code which allows users to decrypt and replicate copyrighted DVD movies (DeCSS). The court held that “compute code is not purely expressive any more than the assassination of a political figure is a purely political statement.” The court considered the DMCA a constitutionally permissible “content-neutral” restriction on speech that was not motivated by a desire to limit the message. Instead the court likened the statute to legal prohibitions against the possession of burglar tools. Any impact on the dissemination of speech is purely incidental. The court further held that the DMCA furthered an important governmental interest — the protection of copyrighted works stored on digital media from the vastly expanded risk of piracy in the electronic age. The substantiality of the interest is demonstrated from the significance to U.S. economy of trade in copyrighted materials. There is no prior restraint issue here because the First Amendment interests served by the dissemination of DeCSS are minimal in light of its predominately functional character. The court rejected an overbreadth argument because the movies are available for fair uses without utilizing circumvention technology. Recognizing that its injunction based on a link to another site might be

“overkill” the court required clear and convincing evidence that those responsible for the link (1) know that the offending material is on the linked-to site; (2) know that it is circumvention technology that may not be lawfully offered; and (3) create or maintain the link for the purpose of disseminating that technology. Finally, the court rejected the argument that such relief was futile in light of the fact that DeCSS is already all over the Internet. “[S]ociety must be able to regulate the use and dissemination of code in appropriate circumstances. The Constitution, after all, is a framework for building a just and democratic society. It is not a suicide pact. (*Universal City Studios Inc. v. Reimerdes* _____ (S.D.N.Y. 2000)).

11. On appeal, the Second Circuit upheld the lower court’s finding that suppression of the DeCSS code did not violate defendant’s First Amendment rights. The court recognized that computer code qualifies as speech for First Amendment purposes. The court defines speech as “conveying of information.” The court in a note recognizes that to qualify as “speech” the speech must be protectable. “Protected speech may communicate, among other things, ideas, emotions or thoughts.” Thus, deciding that code is speech does not necessarily mean it is or is not copyright protected. (In other words “speech” includes copyrighted works, but is not limited to this category). Even though code is potentially speech, the court holds that the functionality of computer code affects the scope of First Amendment work. Comparing CSS to “a lock on a homeowner’s door, a combination of a safe, or a security device” and DeCSS to “a skeleton key that can open a locked door, a combination that can open a safe, or a device that can neutralize the security device attached to a store’s product,” the court stresses that these functional aspects limit the scope of First Amendment protection. Thus, the functional capacity of DeCSS – to instruct a computer to decrypt CSS – does *not* qualify as a speech component under the First Amendment. Based on the functional nature, it can be regulated without violating the 1st Amendment. Moreover, since the DMCA only enjoins the functional aspect of the code, “regardless of whether DeCSS code contains any information comprehensible by

human beings that would qualify as speech,” it is a content neutral regulation which has only an incidental effect on a speech component. To survive scrutiny the laws must 1) serve a substantial governmental interest; 2) this interest must be unrelated to the suppression of free expression; 3) incidental speech restrictions must not burden speech “substantially more . . . than is necessary.” (relying on *Turner Broadcasting*, 512 U.S. at 662). Rejecting any need to demonstrate use of least restrictive alternative means, and stressing the harm created by digital piracy, the court upholds the anticircumvention provisions of the DMCA. The court applies the same speech/non-speech dissection to determine whether the posting prohibitions imposed to prevent trafficking in the DeCSS code violate the 1st Amendment. It found that the linking prohibition was justified solely by the functional capability of the hyperlink. It went on to reject any claim that such injunction violates the First Amendment unless it meets the same requirements for print media. In particular, the court rejected an analogy to printing a list of bookstores that distribute obscene books.

It should be noted that Section 1201(a) does not require that it effectively controls *copying*, only access. Copy control would arguably implicate the fair use doctrine. By contrast, access control does not give rise to a fair use right. Thus, Section 1201(a) does not allow the use of a fair use defense, because fair use is a defense aimed at copyright infringement. “Access” is not arguably the same as “reproduction” or “distribution,” therefore, copying is not prevented, only access.

- (d) There has been some dispute over the scope of Section 1201(a) and whether it is limited to copyrighted works. The use of the phrase “under this title” would be construed as title 17, which means it must be copyright protectable. Nevertheless, since the anti-circumvention provisions protect technological measures, regardless of whether they are copyright protectable, they are not a

copyright provision per se. Moreover, as noted above, “access” is *not* right under a copyright. Finally, Section 1201(b) which deals with “trafficking” (see below) specifically refers to a measure that “protects a right of a copyright owner under this title.” It is unclear why the terminology exists, but it seems to indicate that circumvention prohibition is broader than merely protecting copyrighted works. This definition was given credence in *Lexmark* in the district court’s decision (see below). Links to the first page of a website are generally considered acceptable without the consent of the linked site. However, links to sites which contain illegal material may result in liability.

- (e) In *Universal City Studios Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), the court found that linking to a site that posted illegal circumvention technology violated the DMCA only if “clear and convincing evidence” existed that those “responsible” for the link (a) know at the relevant time that the offending material is on the linked-to site (b) know that it is circumvention technology that may not be lawfully offered and (c) create or maintain the link for the purpose of disseminating that technology.” Such test was required to reduce “the possible chilling effect a rule permitting liability for or injunctions against hyperlinks” may cause. The court further found that such liability did not violate the First Amendment. On appeal, the court did not reach the issue of whether such a stringent test was required. (*Universal City Studios Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001))

- (f) In *Los Angeles Times v. Free Republic*, 54 U.S.P.Q. 2d 1453 (CD Cal. 2000), the court rejected a fair use defense for the posting of news articles for comment purposes. It specifically rejected any claim that using hyperlinks instead of posting the articles would not be “as easy or

convenient for . . . users as full text posting.” And would thus make the posting practice a fair use. Even if some links become outdated (and therefore inactive), it was not sufficient to justify the posting.

The Fair Use Doctrine

1. The definition of a “fair use” which does not require the copyright owner’s permission.
 - (a) In certain limited situations, the doctrine of Fair Use permits the use of a copyrighted work, including its reproduction, in whole or in part, and its distribution, without the permission of the copyright owner. Fair use is an equitable doctrine which is based on a factual analysis of a wide variety of factors.
 - (c) Fair use is an affirmative defense. Plaintiff must establish a prima facie case of copyright infringement before the defendant must prove fair use.
2. Various theories have been offered to support fair use. For example, in *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (Betamax Case), Blackmun, in his dissent contended that fair use is only available for copying for socially valuable purposes that generate “external benefits.” This theory of “productive consumption” has been reflected in the “productive” uses/transformation cases, such as parody in *Acuff-Rose*.
 3. A second theory downplays “productive” or “customary” uses and instead examines the issue on the basis of economics or a so-called “market failure” theory. In a perfectly competitive market, consensual transfers are supposed to result in the movement of resources to those who value them the most. Market flaws may prevent such consensual transfers so a court permits the transfer as a fair use to correct for such flaws. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 Colum. L. Rev. 1600 (1982). I think the idea of socially desirable uses where the transaction costs might be higher makes sense. But as a public policy issue, isn’t the legislative the one to decide? And how does parody fit within this category? Should the courts really be in the position of deciding what is a socially desirable goal? Although in cases like reverse engineering as a fair use isn’t that exactly what the court is doing?
4. Robert Merges claims that a market failure analysis even applies in cases of parodies. He would define as part of “transaction costs” “the risk of bargaining breakdown (which are at the very least increased by the prospect of an embarrassing parody) or even the extra costs of overcoming a party’s non-economic resistance to an exchange. In such cases, the logic of compulsory licensing applies: the law must supply a mutually beneficial exchange where the market will not.” Robert Merges, *Are You Making Fun of Me?*

Notes on Market Failure and the Parody Defense in Copyright, 21 A. PLA Q.J. 305, 309-310 (1993). He further claims that the “dissemination” principle of copyright supports fair use grants. The problem with these theories is that they are based in a devaluation of a “property” right in copyright and an over-valuation of parody.

5. But one of the critical issues for market failure theory is whether we are seeing market failures where none exists or are construing failures and granting a fair use that would frustrate a viable market for that use. The critical issue is whether such markets should be reserved for the copyright owner.
6. In the photocopying cases discussed below, *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1995), *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996), the courts considered whether there was a viable market for access to out of print and other materials. This analysis seems to support some consideration of market failure principles.
7. Some have argued that user’s expectations about reasonable and customary practice should be considered in ascertaining fair use. Jessica Litman, *Copyright Non Compliance (or Why We Can’t “Just Say yes” to Licensing)*, 29 NYU J. Int’l L. & Pol’y 239 (1996-1997). If this is true, then ultimately massive theft becomes a fair use.
8. Professor Lydia Pallas Loren criticizes the *Texaco* and *MDS* courts for only inquiring whether one particular type of market failure – high transaction costs – is present. She alleges that emphasis on monetary concerns and transformative uses misconceives copyright laws goals on promotion the progress of knowledge and learning. She contends that a permission system may not cure a market failure in cases of research, scholarship or education where external benefits “cannot be efficiently internalized in any bargained for exchange” (Is this the, I help society, therefore, I shouldn’t have to pay for it?). Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. Intell. Prop. L. 1 (1997).
9. Ultimately a decision about whether a new potential market should belong to the copyright owner drives many of the questions over the ownership of new technologies.
10. Some contend that *Napster* et al is all about market failure and the difficulties in seeking out copyright owner’s for permission to exchange songs. Other’s contend that *Napster*’s use is productive and serves some socially desirable goal (dissemination without pay).
11. Statutory factors to consider in deciding whether a use is “fair” one.

(a) Section 107 of the 1976 Copyright Act sets out four statutory factors which courts consider in determining whether a given use is a “fair” one or not. They are:

(63419872) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(a) The unauthorized user does not have to charge a fee or earn money to qualify as a "for profit" use.

- (b) Indirect profit from increased subscriber to a BBS, increased prestige for the service, and increased market for calling cards sold by the defendant served to defeat defendant's fair use challenge to copyright infringement arising from the defendant's unauthorized "non-profit" distribution of pre-release video games (*Sega Enterprises v. Mapphia*, 857 F. Supp. 679 (N.D. Cal. 1994)).
- (c) In *Sundeman v. Seajay Society Inc.*, 142 F.3d 194 (4th Cir. 1998), the court considered the test to be "whether the user stands to profit from the exploitation of the copyrighted work" and not simply whether the motive was monetary gain. It held that reproduction of a fragile manuscript in order to preserve the original, and to use the copy to prepare a critical commentary was a not for profit use.
- (d) Posting articles on a website was freely accessible because the purpose of the site was to provide a current events discussion forum and the articles assisted in attracting visitors. This in turn enhanced plaintiff's "ability to generate good will for their operations." The relevant inquiry "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." (quoting *Harper & Row*, 471 U.S. 539). The court also cited presence of donations request on web-site and ads as further evidence of commercial nature of the site. This seems to indicate that websites that post advertising may "automatically" qualify as commercial sites for fair use analysis. (*Los Angeles Times v. Free Republic*, _____ (CD Cal. 2000)).
- (e) Similarly in *Marobie - FL v. National Assoc. of Fire Equipment Distributors*, 45 U.S.P.Q. 2d 1236 (ND Ill. 1997), the court held that placing clip art on its free web-site was beneficial to the association since the site was used to promote the association, whose members paid dues, and of generating revenue.
- (f) In *American Geophysical Union v. Texaco Inc.* 60 F.3d 913 (2d Cir. 1995), Texaco reaped an indirect benefit from its photocopying of articles for research purposes, which had an impact on its ability to develop marketable products.
- (g) Taken as a trend, it appears that any potential economic benefit turns the use into a commercial one. Thus, almost all uses lose under this factor, if such analysis is applied. However, "transformation" (see

below) may alter the balance.

- (h) Use of copyrighted photographs as evidence in an arbitration proceeding was held to be more “commercial” than a judicial proceeding because it is often selected by parties to a contract as a commercially advantageous method of resolving business disputes. (*Images Audio-Visual Productions v. Perine Bldg. Co.* 54 U.S.P.Q. 2d 1635 (ED Mich. 2000) (a reach, altho the decision itself regarding liability may be accurate based on the facts).
- (i) Whether a use is a “transformative” one has also been relied upon to determine the commercial nature of the use. (See e.g. *Acuff Rose* and cases discussed infra).
 - (1) In *Images Audio-Visual Productions v. Perine Building Co.* 54 U.S.P.Q. 2d 1635 (ED Mich. 2000), transformative use analysis was used to find against the use of construction site photos in an arbitration proceeding involving the construction site. The court found the use of unauthorized reproductions of the photos was the same use for which the photos were intended to serve: to provide a pictorial review of Perini’s progress on the building project.
 - (2) The absence of commercial use eliminates the presumption of unfairness but does not make the use fair. Use of a copyrighted religious text to gain adherents, however, was a sufficient “advantage” to weigh against fair use. Particularly since new members to tithe ten percent of their income to the church, (*Worldwide Church of God v. Philadelphia Church of God*, 227 F.3d 1110 (9th Cir. 2000)).
 - (3) In *Kelly v. Arriba Soft Corp.*, F.3d 811 (9th Cir. 2003), the court described the transformative use test as whether the sue at issue “merely superseded the object of the

originals or instead added a further purpose or different character.” In finding that the reproduction of plaintiff’s photographs into thumbnail sketches which were stored in the search engine’s database were a transformative use the court noted that such sketches did not replace the originals because when enlarged they lacked clarity, making them “inappropriate” as display material. The court held that the case involved more than a simple retransmission of images in a different medium. To the contrary, Arriba’s use “serves a different function . . . improving access to information on the internet versus artistic expression.” Among the acceptable transformative uses which the court acknowledges are news gathering, searching and comparative advertising. Ultimately the court stressed the public benefit “by enhancing information-fathering techniques on the internet.”

- (4) In *Sony Computer Entertainment America Inc. v. Bleem*, 214 F.3d 1022 (9th Cir. 2000), the court held that defendant’s reproduction of “screen shots” from Sony’s computer games qualified as a fair (transformative?) use because “comparative advertising redounds greatly to the purchasing public’s benefit with very little corresponding loss to the integrity of Sony’s copyrighted material.”
- (5) In *American Geophysical Union v. Texaco, Inc.* _____ (2d Cir. 1994), the

court described the transformative use concept as “pertinent . . . because it assesses the value generated by the secondary use and the means by which such value is generated.” It rejected Texaco’s photocopying of journal articles for research purposes as being “transformative.” Such transformations “merely transforms the material object embodying the intangible article.” The “predominant archival purpose” however tipped the balance “against the copier, despite the benefit of a more usable format.”

(2) The nature of the copyrighted work;

(a) As a general rule, literary works are subject to a greater amount of protection than factual works such as directories and the like. Consequently, it is generally harder to obtain a fair use exception for the unauthorized reproduction of a literary work than for a fact work.

(3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole;

(a) This requires an examination of both the quantitative amount used, as well as the qualitative amount used.

(b) There is no bright line rule for the amount of copying which automatically qualifies as outside the parameters of a fair use. Courts have found copying of as little as 55 seconds out of a 1 hour and 29 minute film to qualify as outside the scope of fair use. (*Roy Export Co. Establishment v. Columbia Broadcasting*

System, Inc., 503 F. Supp. 1137 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1095 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982))

- (c) Similarly, copying the “heart of the matter” even if quantitatively small is sufficient to place such copying outside the scope of fair use.
 - (1) Thus, for example, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), the unauthorized publication of former President Ford’s previously unpublished memoirs was found to be outside the scope of the Fair Use Doctrine. Although the infringing article in question had only reproduced 13% of the unpublished work, it had reproduced the “heart” of the memoirs -- the events surrounding the Nixon pardon.
 - (2) By contrast in *Hofheina v. MC Productions Inc.*, _____ (EDNY 2001) found that copying what was necessary to tell the story of a documentary on “B” movies did not qualify as taking the “heart” of the matter. The court focused on the defendant’s only taking short clips to depict the character and nature of American International Picture’s evolution.
- (d) The effect of the use upon the potential market for or value of the copyrighted work.
 - (1) Potential markets include those which a copyright owner might have entered,

even if the owner has not made any plans to enter such market.

- (2) Potential markets may also include “markets that creators of original works would in general develop or license others to develop.” (*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)).
- (3) Market harm existed with unauthorized publication of trivia book based on popular TV show, even though the plaintiff evidenced little interest in creating and publishing a book of trivia. (*Castle Rock Entertainment Inc. v. Carol Publishing Group*, 47 U.S.P.Q. 2d 1321 (2d Cir. 1998)).
- (4) The economic impact of widespread Internet distribution, and the potential effect of creating competing Scientology-like religious training raised a genuine issue that unauthorized postings of religious works would hurt plaintiff’s market for its work [creation of competition causes economic harm] (*RTC v. Netcom*, 907 F. Supp. 1361 (N.D. Cal. 1995)).
- (5) Where the market is limited, market impact may be increased. (*American Geophysical Union v. Texaco*, 802 F. Supp. 1 (S.D.N.Y. 1992)).
- (6) One issue that has created debates about market impact is the circuitry of

the logic in deciding that an impact exists. In *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994) and in the en banc decision in *Princeton University Press v. Michigan Document Services Inc.*, 99 F.3d (6th Cir. 1996), the court criticized the circuitry argument but stressed that the existence of a ready licensing market makes a use “less fair.”

- (7) In *Hofheinz v. AMC Productions Inc.* _____ (EDNY 2001), the court rejected plaintiff’s argument that the unauthorized use of movie clips and posters in a documentary on “B” movies harmed the market value for the works infringed. The focus is not on the ability to license the works in the future but on the demand for the works themselves. The court feared the plaintiff’s argument “would eviscerate the affirmative defense of fair use since every copyright infringer . . . could have potentially sought a license from the owner of the infringed work.”
- (8) The absence of a conventional market or evidence of actual or potential monetary loss does not result in a fair use or “copyrights held by non profits would be essentially worthless.” The proper inquiry in such case is the effect on the value of the copyrighted work. In the case of a religious work, its value was as a marketing device used to evangelize the Christian

community. (*Worldwide Church of God v. Philadelphia Church of God*, 227 F.3d 1110 (9th Cir. 2000)).

- (9) Failure to publish a work, or the lack of a present intention to resume publication does not demonstrate lack of value. “Even an author who had disavowed any intention to publish his work during his lifetime was entitled to protection of his copyright, first, because the relevant consideration was the ‘potential market’ and second, because he has the right to change his mind.” (*Worldwide Church of God v. Philadelphia Church of God*, 227 F.3d 1110 (9th Cir. 2000)).
- (10) One of the critical issues in deciding market impact is whether there is harm when there is no threat of confusion as to source or conversion of revenue. The clearest cases presenting this challenge are parody cases such as *Air Pirates* and *Acuff-Rose*. In *Air Pirates* the harm to the reputation of the copyrighted work (tarnishment) appeared to be sufficient to support a finding of infringement. By contrast, in *Acuff-Rose* such harm was not enough to prevent fair use. It is not clear if the court found lack of harm in part because it accepted the argument that the parody was a criticism of the _____ of *Pretty Women*, and, therefore, found no tarnishment. Since *Air Pirates* (or any other work) could be considered some type of criticism, it should pass muster under *Acuff-Rose*. However

Acuff-Rose did not effectively address this issue. It leaves the question of the role of tarnishment in copyright analysis open.

- (11) In a pre-1976 case, *Williams & Wilkens Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by equally divided Court*, 420 U.S. 376 (1975), the court upheld the defendant's photocopying of articles from plaintiff's journals for distribution to medical researchers. It rejected a claim of harm based on loss of presumed royalties. The court condemned presuming harm based on presumed royalties since the presumption of royalties assumes that the defendant's use was not fair. "[O]ne cannot assume at the start the merit of the plaintiff's position . . ."
- (12) Goldstein suggests that the *Williams & Wilkens* decision ignores that fair use includes "potential" harm. By the same token, considering harm in *all* markets no matter how remote seems equally unavailing. Goldstein suggests that *Acuff-Rose* with its transformation test may have created a practical middle ground.
- (13) Courts have treated the determination of potential economic loss in an interesting fashion. For example, there are certain lost market potentialities that seem to be given little credence. Thus, for example, the loss of licensing potentiality for rap music was given short shift in *Acuff-Rose*.

Similarly, in *Kelly v. Arriba Soft Corporation*, 336 F.3d 811 (the Cir. 2003), the court did not consider that plaintiff copyright owner would be denied license fees for databases for search engines. The ultimate question posed is how are potential market opportunities determined?

- (14) In *American Geophysical Union v. Texaco Inc.*, 32 U.S.P.Q. 2d 1545 (2d Cir. 1994), the court held that “not every effect on potential licensing revenues enters the analysis.” Only “traditional, reasonable, or likely to be developed markets “should be considered. Thus, the presence of a growing market for the sale of individual articles through licensing through CCC (Copyright Clearance Center) was considered in deciding that the copying of journal articles for research/personal convenience purposes was *not* a fair use.
- (15) Similarly in *Campbell v. Acuff-Rose*, 510 U.S. at 590-91, the Court limited the market for “potential derivative uses” “includes only those that creators of original works would in general develop or license others to develop.” Finding that the “unlikelihood that creators of imaginative works will license critical reviews or _____” of their works, the court found no adverse market impact from a rap parody.

(16) In *Mattel, Inc. v. Pitt*, 229 F. Supp. 2d 315 (S.D.N.Y. 2002), the court relied on *Campbell* in upholding the sale of Dungeon Barbies. The court held that “especially when confronted with a parody” it must determine “the likelihood of the copy acting as a market substitute for the original” which it defines as whether the copy “usurps” the demand for the original. The court acknowledged that “[i]n the case of parody, it is unlikely that the copy will affect demand for the original at all, much less “supplant” it. Furthermore, reduced demand caused by a parody’s criticism of the original “does not produce a harm cognizable under the Copyright Act.” (city *Campbell*, 510 U.S. at 592). For derivative market use, the court held that “only the harm of market substitution would be relevant.” The absence of any likelihood that Mattel would develop or license the sale or display of adult dolls weighed against infringement.

2. No one factor is determinative. Although as a general matter a finding of adverse market impact leads to a finding of no fair use, it is not conclusive.
3. Courts may also consider other factors including whether prohibiting the act in question has an adverse impact on the free speech rights guaranteed under the First Amendment of the US Constitution.
4. Courts may also consider whether the work in question has been previously published. Although unpublished works are not entitled to a higher standard for qualifying fair use, in fact, most courts generally do not consider

unauthorized reproduction of a previously unpublished work to qualify as fair use (*Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985))

- (a) Use of an unpublished still in a documentary qualified as a fair use. The unpublished nature of the work was not dispositive. (*Hofheinz v. AMC Productions Inc.*, _____ (EDNY 2001)).
 - (b) In *Bond v. Blum*, _____ (4th Cir. 2003), the court held that copying a manuscript or introduction into evidence in a state court custody proceeding constituted fair use because the substance (regarding an alleged patricide) was relevant, and it was being offered for its content, *not* its expression. It rejected the claimed harm of loss of right to control a “private” or “confidential” document because the protection of privacy is *not* a function of copyright law. “To the contrary, the copyright law offers a limited monopoly to encourage ultimate public access to the creative work of the author.”
 - (c) In *Video Pipeline Inc. v. Buena Vista Home Entertainment Inc.*, _____ (DN J 2002), the plaintiff provided previews of home videos for client home video retailers and made its own clip previews. The court rejected a fair use defense finding no transformative use. The court held such clips “involved no new creative ingenuity, apart from the snipping and slicing . . . in order to excerpt about two minutes from a full-length motion picture.” The court acknowledged that such clips might promote sales but viewers might also attribute an inferior clip preview to the quality of the film itself.
5. In recent cases, courts have relied increasingly in whether the defendant’s use is a transformative one.

- (a) *In Castle Rock Entertainment Inc. v. Carol Publishing Group Inc.*, 150 F.3d 132 (2d Cir. 1998), transformation of television scripts into a trivia book did not qualify as a transformative one because it was done with no intent to criticize, comment on or parody the *Seinfeld* show.
- (b) *In Tiffany Design Inc. v. Reno-Tahoe Specialty Inc.*, _____ (D. New. 1999), scanning a photograph in order to manipulate the scanned image did not qualify as a transformative use.
- (c) *In Los Angeles Times v. Free Republic* _____ (CD Cal. 2000), posting news articles on a website for comment and criticism did not qualify as a transformative use. Adding commentary did not transform the work.
- (d) *In Hofheinz v. AMC Productions Inc.*, _____ (EDNY 2001) the use of movie clips and posters qualified as a transformative use that created a new copyrightable work. It also cited the role of the documentary as being within the ambit of criticism, comment or research.

6. Circumventing technological protection devices without authorization cannot be defended under fair use doctrines. The DMCA did not include fair use among the exceptions. It struck a balance by prohibiting the act of circumvention while leaving traditional fair use defenses to people who obtain authorized access. “By prohibiting the provision of circumvention technology, the DMCA fundamentally altered the landscape.” (*Universal City Studios v. Reimerdes*, 82 F. Supp. 2d 2111 (S.D.N.Y. 2000)), *aff’d Corley v. Universal Studios* _____ (2d Cir. 2001).

3. The application of the Fair Use doctrine in

particular situations

(a) News reporting

- (1) In *Pacific & Southern Co. v. Duncan*, 744 F.2d 1490 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985), the defendant video-taped the plaintiff's news broadcasts and sold copies to the subjects of the broadcasts. The court found that such activity did *not* qualify as fair use due to the "predominantly commercial nature" of the defendant's actions and the potentially adverse impact that such acts could have on the value of the plaintiff's copyrights.
- (2) In *Religious Technology Center v. Lerma*, 908 F. Supp. 1362 (E.D. Va. 1995), the unauthorized quotation of copyrighted religious documents in news articles qualified as a fair use.
- (3) In *ITAR-TASS Russian News Agency v. Russian Kurier, Inc.*, 886 F. Supp. 1120 (S.D.N.Y. 1995), the unauthorized copying of articles from a Russian newspaper for distribution in an American Russian-language newspaper did *not* qualify as a fair use.
- (4) Similarly, in *Los Angeles News Services v. KCAL-TV Channel 9*, 103 F.3d 1119 (9th Cir. 1997), the unauthorized broadcast of a copyrighted videotape of rioting in Los Angeles did *not* qualify as a fair use. Although the tape itself might have qualified as a "news item" and its use was "arguably in the public interest because it was a percipient recording of a newsworthy event" such use was not fair where there were other alternative tapes available to broadcast the event.

- (5) Abstracts based on plaintiff's articles did not qualify as fair use since the abstracts used the same structure and organization, followed the same chronological and substantive grouping of facts, and resulted in the same conclusions, thus lacking transformation. (*Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, ___ (2d Cir. 1999))
- (6) The unauthorized posting of copyrighted newspaper articles on a website did not qualify as a fair use, even though such postings were made to allow comment on the articles and to be certain the articles would remain available (since hyperlinks might not assure continued access as the postings become stale). The court cited the adverse market impact of such copying (*Los Angeles Times v. Free Republic*, 54 U.S.P.Q. 2d 1453 (CD Cal. 2000)).
- (7) Reproduction of modeling photographs related to a controversy over the Miss Puerto Rico Universe contest qualified as a fair use because the pictures gave context to the articles (*Nunez v. Caribbean International News Corp.*, _____).
- (8) Similarly in *Baraban v. Time Warner Inc.*, 54 U.S.P.Q. 2d 1759 (S.D.N.Y. 2000), reproduction of a photograph used in a political advertisement in a book qualified as a fair use because it constituted a commentary of the message of the advertisement.

(b) Education

- (1) In *Basic Books, Inc. v. Kinko's Graphics Corporation*, 758 F. Supp. 1522 (S.D.N.Y. 1991), the use of copyrighted materials for educational purposes did *not* automatically qualify as a fair use. Kinko's practice of reproducing portions of copyrighted works for profit for inclusion in course packs and anthologies for use as classroom

textbooks without obtaining the permission of the copyright owner did *not* qualify as fair use. The excerpts in question included articles and chapters from textbooks, including works that were out of print.

- (2) In *American Geophysical Union v. Texaco Inc.*, 32 U.S.P.Q.2d 1545, *order amended and superceded*, 35 U.S.P.Q.2d 1513 (2d Cir. 1994), *cert. dismissed*, 116 S.Ct. 592 (1995), the reproduction of scientific articles for use by researchers did *not* qualify as a fair use. The court relied heavily upon the adverse market impact of such copying by a for-profit company. Reproduction for librarying purposes was not considered “fair” even though the articles were used for scientific research. In reaching this conclusion, the court rejected the “personal convenience” defense and relied strongly on the non-transformative nature of the use at issue, as well as the harm of such copying on non-profit journals. Like other educational uses cases, the court was strongly influenced by the presence of a working licensing system.
- (3) In *Princeton University Press v. Michigan Document Services*, No. 94-1778, 1996 WL 54741 (6th Cir. Feb. 12, 1996), (opinion vacated and withdrawn) the reproduction of six copyrighted excerpts by a “copy shop” for profit for use in a course pack qualified as a fair use. The court relied upon the ultimate educational use of the materials and the fact that the excerpts did not “supersede the original works.” The decision was subsequently vacated by the court and is currently sub judice.

(c) Commentary and criticism

- (1) In *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253

(2d Cir. 1986), quotations of approximately 4.3% of a plaintiff's book, which dealt with the issue of adoption and abortion were copied by the defendant for use in his anti-abortion book. Such copying was found to qualify as a fair use.

- (2) Use of an unpublished manuscript, including making a copy of the manuscript to preserve the original, to create a scholarly literary criticism was a fair use. (*Sundeman v. Seajay Society Inc.*, ___ (4th Cir. 1998) market harm which might be caused by negative criticism was not relevant to the analysis.
- (3) Posting entire articles on a website to permit commentary and criticism by visitors did not qualify as a fair use since no transformation of the articles occurred. "The mere fact that criticism is involved does *not* warrant an automatic finding that . . . favors defendants." Such denial to did not violate the First Amendment because defendants could provide a link to the articles to be criticized. (*Los Angeles Times v. Free Republic*, 54 U.S.P.Q. 2d 1453 (CD Cal. 1999)).
- (4) The reproduction in black and white of a color photograph used in a political advertisement for Nuclear Power in a book that criticized such op-ads (a commentary on a political or social issue paid for as advertising by an advocacy group) qualified as a fair use. (*Baraban v. Times Warner Inc.*, 54 U.S.P.Q. 2d 1759 (S.D.N.Y. 2000).
- (5) In *Ty, Inc. v. Publications International Ltd.*, 292 F.3d 512 (7th Cir. 2002), a Beanie Baby collector guide with pictures of well-known Beanie Babies might qualify as a legitimate fair use. Summary Judgment was denied since questions about whether displaying such photos was the only reasonable

way to prepare a guide. The court indicated that a guide is similar to a book review.

(d) Parody and satire

- (1) In *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), the US Supreme Court determined that a parody of a well-known love ballad done by a rap music group qualified as a fair use even though the parody copied the original's first line and bass riff. The Court emphasized that the new work did not "merely supersede" the original but actually transformed it into "something new, with a further purpose or different character."
- (2) Merely labeling a use as a parody or satire, however, is not sufficient. Instead, the parody must have a "critical bearing on the substance or style of the original composition" to be a fair use. Thus, parodists must not only transform the material in some fashion. They must also limit their copying of the original material to that portion which is necessary to conjure up the original and not simply to free-ride on it. In *Campbell* however, the court did not spend a great deal of time deciding where the border between conjuring up and infringement lie. It appears that the more transformative the use, the less concern with the amount copied.
- (3) In *Dr. Seuss Enterprises L.P. v. Penguin Books USA Inc.*, 109 F. 3d 1394 (9th Cir. 1997), the court read the parody exception narrowly and found that the comic use of plaintiff's work in a book making a biting comment about the O.J. Simpson case did not qualify as fair use because it was a "satire" not a "parody."
- (4) The parody/satire distinction set up by Kennedy makes for a largely unworkable standard. Posner

has suggested that satire as target would be acceptable, while satire as weapon is not fair use. (See Bob Lavin, *The Pirates and the Mouse: Disney's War Against the Counter-Culture* (2003) (p. 228 n. 161)). Applying that test, however, seems as problematic as deciding what is a satire, and what is a parody.

- (5) Similarly, failure to transform sufficiently the original may result in denial of fair use, such as in *Colombia Pictures Industries, Inc. v. Miramax Films Corp.* 11 F. Supp. 2d 1179 (CD Cal. 1998), where use of key elements from a poster and trailer for the film "Men in Black" to promote defendant's documentary was not a fair use.
- (6) Transformation was found in a comedy fist fight between the San Diego Chicken and a putative Barney because the routine ridiculed Barney and did not duplicate the Barney costume or use its copyrighted songs. (*Lyons Partnership L.P.V. Giannoulas*, 14 F. Supp. 2d 947 (N.D. Texas 1998)).
- (7) Copying more than was minimally necessary to "conjure up" the original Annie Leibovitz photo of a naked and pregnant Demi Moore did not disqualify the parody as a fair use since the reasonableness of taking additional aspects of the original work depends on the extent to which the copy serves a parodic purpose and the likelihood that the parody may serve as a substitute for the original (*Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998)).
- (8) As the court in *Baraban v. Time Warner Inc.*, 540 U.S.P.Q. 2d 1759 recognized satire mimics the copyrighted work, using it as a vehicle to poke fun

at another target, and is generally granted less fair use protection.

(9) In *Walt Disney v. Air Pirates* _____, the court rejected a fair use defense for the unauthorized reproduction of frames, and cartoon characters in a comic. The comic contained a cover of Mickey flying a plane of “dope.” The interior contained a scatological story in which Mickey had sex with Daisy Ducky, gave Minnie a sexually transmitted disease, got kidnapped by the Air Pirates, engaged in the “69” with Minnie and took LSD. The court found that excessive copying precluded fair use. It also rejected any First Amendment defense since there were other methods for expressing the criticism of Disney. Wendy Gordon rejects such reasoning since the comic was more effective than a treatise. She, however, doubts that the sexual content would ever be consider fair.

problematic. (10) Fair use for sexual parodies seems extremely

(11) In *Fisher v. Dees*, _____ the novelty song “When Sonny Sniffs Glue” was a fair use parody of the Johnny Mathis ballad “When Sonny Gets Blue.” [Apparently drug use parodies may be acceptable.]

(12) In *Elsmere Music, Inc. v. Nat’l Broadcasting Co.*, _____, the transformation of “I Love New York” into “I Love Sodom” by Saturday Night Live. “In today’s world of often unrelieved solemnity, copyright law should be hospitable to the humors of parody.”

(13) By contrast, in *MCA Inc. v. Wilson* _____ “the Cunnilingus Champion of Company C” parody of the Andres Sisters’ “Boogie Woogie Bugle Boy of

Company C” was not a fair use. Once again sexual parody was insufficient.

- (14) Similarly, in *Walt Disney Productions v. Nature Pictures Corp.*, _____, use of the Mickey Mouse theme song in the film “The Happy Hooker” at the time the heroine sexually serviced three teenagers wearing Mouketeer ears was found to be infringing. It appears some sexual parodies are acceptable but prudery will still prohibit others that are too explicitly sexual.
- (15) In *Mattel, Inc. v. Pitt*, 229 F. Supp. 315 (S.D.N.Y. 2002), the defendant offered for sale a “Dungeon Doll” which is a repainted and recostumed Barbie Doll. Despite the potential tarnishment of Barbie’s image (the court expressly found that Mattel has no line of S & M Barbie, the court found that the Dungeon Barbie was a transformative comment or parody. Moreover, given the parody nature of the work, the court found “there is slim to no likelihood that Dugeon Dolls would serve as a market substitute for Barbie Dolls.” Relying on *Campbell*, the court held that when faced with a parody, to determine market impact, “a court must determine the likelihood if the copy acting as a market substitute for the original.” It went on to hold that “[i]n the case of parody, it is unlikely that the copy will affect demand for the original, much less ‘supplant’ it.” Moreover, the court expressly held that reduced demand caused by a parody’s criticism “does not produce a harm cognizable under the Copyright Act.” (citing *Campbell*). The court rejected any harm based on derivative market _____ since “the sale or display of “adult” dolls does not appear to be a use Mattel would likely develop or license others to develop.”

(e) Home recording

- (1) In *Sony Corp. Of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the US Supreme Court found that home taping of television broadcast programs for the purpose of later viewing qualified as a fair use, even though such taping resulting in the reproduction of the entire work.

(2) It should be noted, however, that *Sony* does *not* permit the copying of programs for the purpose of creating a home library of such materials. Only time shifting is recognized as a fair use for home recorded materials.

(f) The “Personal Use” Right

(1) The enactment of the Digital Audio Home Recording Act arguably represented an extension of the right to home recordings to sound recordings for personal use. (17 U.S.C. § 1008).

(2) Section 1008 provides in ‘pertinent part.’ “No action may be brought under this title alleging infringement of copyright . . . based on the non commercial use by a consumer of [a digital audio recording device, a digital audio recording medium, an analog recording device or an analog recording medium] for making digital musical recordings or analog musical recordings.” (17 U.S.C. § 1008).

(3) Unfortunately, the definition of a digital audio recording device is “any machine or device of a type commonly distributed to individuals for use by individuals . . . the digital recording function of which is designed or marketed for the primary purpose of . . . making a digital audio copied recording for private use.” (17 U.S.C. § 1001(3)).

(4) Similarly, a digital audio recording machine is defined as “any material object in a form commonly distributed for use by individuals, that is primarily marketed or most

commonly used by consumers for the purpose for making digital audio copied recordings by use of a digital recording device.” (17 U.S.C. § 1008(4)).

- (5) By definition, a “digital audio recording device” does *not* include a computer or its hard drive since such devices are not marketed primarily for the purpose of making a digital audio recording. See also *Napster*. Thus, the personal use right does not extend to most downloaders.
- (6) By contrast, an MP3 player *does* qualify as a digital audio recording device since it is sold primarily for making/storing digital audio recordings. **(Insert Z)**
Thus, most who download into MP3 players theoretically have a personal use right.
- (7) I think that CD burners should also qualify since whether music is downloaded or transferred from other CD’s, it is still in digital form.
- (8) One of the problems with Section 1008 is that it does not specify whether the source of the digital audio recording must be legitimate for the personal use right to apply. To the contrary a “digital musical recording is defined as “a material object in which are fixed, in a digital recording format, only sounds and material, statements, or instructions incidental to those fixed sounds, if any, from which the sounds and material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” (17 U.S.C. § 1001(5)(A)).

- (9) This oversight is not corrected in the legislative history. Although I would argue that fair use has been premised on the use of legitimate copiers, but although in *Harper Row* the court noted the stolen nature of the manuscript in reaching a decision, it did not absolutely prohibit fair use on the basis of the illegal nature of the copied work.
- (10) In addition to the “personal use” right established by statute under the AHRA, courts have also recognized a limited personal use right.
- (11) In *Sony Betamax* _____, the court recognized a personal right to “time shift” over-the air TV broadcast programs for subsequent viewing.
- (12) In *American Geophysical Union*, _____ (2d Cir. 1994), the court criticized the extension of fair use to non-transformative copying, finding that such “mechanical copying” “is obviously an activity entirely different from creating a work of authorship. Whatever social utility copying of this sort achieves, it is not concerned with creative authorship.” It similarly was unimpressed by the defendant’s “personal convenience” defense, although the court acknowledged that copying to prevent harm to the original in lab experiments “might suffice to tilt the first fair use factors in favor of Texaco if these purposes were dominant” it found that primary purpose was librarying which was *not* acceptable. Spontaneous decisions to copy were acknowledged to be acceptable, but not established here. This case

establishes an extremely narrow personal use right, one which allows spontaneous copying for protection purposes, and potentially research purposes but only so long as librarying is *not* the dominant goal. It also strongly questions any right that allows mechanical copying as a fair use, since such copying has limited social utility.

(g) Internet Uses

- (1) In *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2001), the use of images of plaintiff's photographs in the defendant's search engine database was considered a fair use. Plaintiff's photographs were on the web legally and copied into defendant's search engine without permission. The engine then displayed the works as thumbnail sketches. The transformative nature of the work (discussed below) along with the negligible market impact was strongly relied upon in finding such uses fair. In particular, it relied upon the positive role of search engines in "improving access to information on the Internet versus artistic expression," and the lack of substitutability between the thumbnail sketches and a full image due to its lack of clarity.

(h) Anticircumvention Uses

- (1) In *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (ND Cal. 2002), the court rejected a Constitutional challenge to the failure to provide an express fair use right under anticircumvention provisions. Noting that under the DMCA "certain fair uses may become more difficult," the court held that such difficulty did not mean fair use had

been “prohibited.” “It may, however, have become more difficult for such uses to occur with regard to technologically protected digital works, but the fair uses themselves have not been eliminated or prohibited.” The court rejected inconvenience as a value included within “fair use.” “It may be that from a technological perspective, the fair user may find it more difficult to do so . . . Defendant has cited no authority which guarantees a fair user the right to use the most technologically convenient way to engage in fair use. The existing authorities have rejected the argument.” (citing *Corley*, 273 F.3d at 459).

- (2) In *Curley v. Universal City Studios, Inc.*, 273 F.3d at 459 (2d Cir. ____), the court similarly had rejected the proposition that fair use “guarantees copying by the optimum method or in the identical format of the original . . . 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 on the format of the original.”
- (3) The *Napster* case [*A & M Recordings, Inc. v. Napster Inc.*, 55 U.S.P.Q. 2d 1781 (ND Cal. 2000)] seeks to vindicate “space shifting” in the same way as “time shifting.” Others reject this effort on the grounds that analog copying onto physical recording tape and digital environment in which perfect reproductions can be transmitted worldwide with the press of a button, go beyond the intended time shifting defense of *Sony*.

- (4) The Ninth Circuit rejected Napster's claim that its space shifting served a fair use. The indexing system which Napster employed was held to "simultaneously involve distribution of the copyrighted material to the general public." By contrast, *Rio* see below, only provided a copy "to the original owner."
- (5) In *Recording Indus. Ass'n of America v. Diamond Multimedia Sys. Inc.*, 180 F.3d 1072 (9th Cir. 1999), The Diamond Rio MP3 player did not make copies of files on its player and had no ability to transfer files. It did not qualify as a statutory digital audio recording device under the AHRA and could, therefore, be used without the need to include SCMS (Serial Copyright Management System).
 - (i) Transformative Uses
 - (1) Changing a love ballad into a rap music ballad did not "merely supersede" the original but transformed it into "something new" and qualified as a fair use. (*Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 (1994)).
 - (2) Defendant's copying of images as thumbnail sketches in an index by its visual search engine was "on the whole significantly transformative." In reaching its decision the court relied on the fact that defendant's index was "designed to catalogue and improve access to the [copied] images on the Internet." The nature of the sketch was "not aesthetic, but functional; its purpose is not to be artistic, but to be comprehensive."

(*Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116 (CD Cal. 1999).

(j) Advertisements

- (1) The defendant's use of the plaintiff's copyrighted parts numbering system for product comparisons in catalogues and on the Internet did not qualify as a fair use because the comparison in the ads was for purposes of advertising equivalency. [I think this decision is just plain wrong] (*Southco Inc. v. Kanebridge Corp.*, (ED Pa. 2000)).
- (2) By contrast in *Sony Computer Entertainment American, Inc., v. Bleem LLC.*, _____ (9th Cir. 2000), the court held that the use of video game "screen shots" for comparative advertising regarding its emulator software was a fair one. The emulator software at issue allows a Sony PlayStation game to be played on a personal computer. The ads were used to show the video clarity of the PC generated versions. There was no allegation that the photos used were inaccurate (degraded) so the comparison was a true one. The court cited the absence of competition with regard to the video games themselves, (the subject of the copyright claim) indicating that comparative ads by a non-competing company favors a fair use. (cited *Triangle Publications* with approval)
 - (a) *But cf Triangle Publications Inc. v. Knight Ridder Newspapers Inc.*, 626 F.2d 1171 (5th Cir. 1980), where the reproduction of a TV Guide cover for

purposes of comparing its competing product was found a fair one since comparative advertising as a means of providing more information to the public.

(k) Intermediate Copying/Reverse Engineering

- (1) Even where the defendant's final product contains no infringing material, intermediate copying of computer software is not a fair use unless the copy is done to study unprotected ideas rather than produce a competing product (*Sony Computer Entertainment Inc. v. Connectix Corp.*, 50 U.S.P.Q. 1920 (NP Cal. 1999)).
- (2) The use of Internet "spiders" and "webcrawlers" to make temporary copies of web pages in order to extract and republish factual information about events and the places where tickets can be obtained was a fair use. Although transitory copying occurred, the court relied on *Sony Computer Entertainment Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000) and its reverse engineering analysis to uphold such copying. While the spiders were not exactly used for reverse engineering, the copy made was not used competitively, was destroyed after its limited function was done and was only used to facilitate the obtaining of non-protectable data. (*Ticketmaster Corp. v. Tickets.com Inc.*, _____ (CD Cal. 2000)).
- (3) In *Sega Enterprise Ltd. v. Accolade Inc.*, 977 F.2d 1510 (9th Cir. 1992), the court found the intermediate copying of plaintiff's software" to discover the functional

requirements for compatibility” qualified as a fair use. Reverse engineering to analyze ideas embedded in software for purposes of interoperability was considered necessary for technological development. It should be noted that defendant’s ultimate program did not infringe Sega’s software.

- (4) In *Lexmark Int’l Inc. v. Static Control Components, Inc.*, _____ (ED Kent 2003), the court rejected a reverse engineering defense where defendant had copied plaintiff’s printer toner loading programs in the (mistaken belief that these programs were lock-out codes to prevent inter interoperationality with non Lexmark cartridges. Indicate the court noted that infringement would still exist even if the codes were lock-out code “Security Systems are just like any other computer program and are not inherently unprotectable.”