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Recent Developments

RECENT DEVELOPMENTS IN COPYRIGHT LAW

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I. Introduction

This article reviews selected copyright cases reported in the United States Patent Law Quarterly, Second Series, Volume 48, covering the period of October through December 1998. This review begins, however, with a detailed discussion of new legislation, which far overshadowed case law developments during this period.

II. Legislation

A. Digital Millennium Copyright Act

On October 28, 1998, President Clinton signed into law the Digital Millennium Copyright Act (DMCA).[1] The law's provisions are detailed and complex—some would say convoluted—and thus require an in-depth review. Most of the law ***332** concerns copyright protection in the digital network environment, and it is those aspects that are the subject of this review.

According to the Conference Report, Title I of the DMCA implements the World Intellectual Property Organization (WIPO)

Copyright Treaty and WIPO Performances and Phonograms Treaty.[2] Yet, the principal substantive provisions of this Title go beyond what is required by those treaties and take effect regardless of whether these treaties ever enter into force in the United States.[3]

Title I of the DMCA adds a new chapter to the Copyright Act entitled "Copyright Protection and Management Systems."[4] The new Section 1201 of the Copyright Act sharply restricts the circumvention of technological measures that control access to copyrighted works or that protect copyright owner rights.[5] Section 1201(a) concerns the circumvention of technological measures designed to control access to copyrighted works.[6] Such technological measures include scrambling and encrypting copyrighted works, as well as other measures designed effectively to control access by requiring the "application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work."[7] Section 1201(a)(1)(A) provides that "no person shall circumvent a technological measure that effectively controls access to a work protected under [the Copyright Act]."[8]

This sweeping prohibition on circumventing access control faced significant opposition in Congress from those concerned that it would impair the availability of public domain works and copyrighted works for noninfringing uses.[9] In a gesture towards that concern, Congress provided that the prohibition will not take effect for two years.[10] During that two-year period (and during each succeeding three-year period), the Librarian of Congress must determine whether the circumvention prohibition is likely to adversely affect noninfringing uses of any particular class of ***333** copyright works during the ensuing three years.[11] In making this determination, the Librarian must devote particular attention to the availability of works for non-profit archival, preservation, and educational purposes and for criticism, comment, news reporting, teaching, scholarship, and research.[12] If the Librarian determines that noninfringing uses of certain classes of works will likely be adversely affected by the circumvention prohibition, the prohibition will not apply to those classes of works for the ensuing three-year period.[13]

Yet, despite Section 1201(a)'s seeming concern for the availability of works for noninfringing uses, the new Section 1201(b) of the Copyright Act effectively deprives the vast majority of noninfringing users of any real possibility for circumventing technology protection. Section 1201(b) prohibits the manufacture, import, offer to the public, or provision of any "technology, product, service, device, component, or part thereof" that "is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under [the Copyright Act]."[14] The DMCA's prohibition on the trafficking of the very circumvention devices or services that noninfringing users would need to circumvent technological access controls, as they are permitted to do for at least two years under Section 1201(a), will take place immediately.[15] The prohibition will also apply across the board to all classes of copyrighted works, regardless of the Librarian of Congress's determination under Section 1201(a) that noninfringing uses of certain classes of works will likely be adversely affected by the circumvention prohibition.[16]

Moreover, the new Section 1201(b) contains a parallel prohibition against the trafficking in devices or services primarily designed to circumvent a technological measure that "effectively protects a right of a copyright owner under [the Copyright Act] in a work or a portion thereof."[17] Such technological measures would principally include those that prevent the unauthorized copying of copyrighted works.[18] Here, too, therefore, even those who wish to circumvent technological protection measures in order to make noninfringing copies of copyrighted works, an ***334** act that is permitted without the authorization of the copyright owner,[19] will generally be unable to obtain the device or service needed to make such a copy.[20]

The DMCA provides for narrow exemptions from the anti-circumvention provisions for nonprofit libraries, law enforcement, reverse engineering, encryption research, privacy protection, and security testing.[21] The new Section 1201(d), setting forth the nonprofit library exemption, provides, for example, that a nonprofit library, archives, or educational institution may circumvent protection in order to gain access to a commercially exploited copyrighted work "solely in order to make a good faith determination of whether to acquire a copy of that work."[22] This exemption is available only when "an identical copy of that work is not reasonably available in another form."[23]

The reverse engineering exemption, set forth in new Section 1201(f), is designed to enable circumvention when necessary and otherwise permissible to achieve the interoperability of a computer program with other programs.[24] It provides that
a person who has lawfully obtained the right to use a copy of a computer program may circumvent a technological measure that effectively controls access to a particular portion of that program for the sole purpose of identifying and analyzing those elements of the program that are necessary to achieve interoperability.[25]
This exemption is available only to the extent that "such acts of identification and analysis do not constitute infringement under [the Copyright Act]."[26] Since the question of under what circumstances, if any, intermediate copying for reverse engineering constitutes fair use remains unsettled in copyright doctrine,[27] the reverse engineering exemption is thus itself of

uncertain availability.

***335** Title I of the DMCA also adds a new section, Section 1202, to the Copyright Act, designed to protect the integrity of copyright management information.[28] It defines "copyright management information" as "information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form," among other items, information identifying the work, author, and copyright owner, the terms and conditions for use of the work, and "[s]uch other information as the Register of Copyrights may prescribe by regulation."[29] Section 1202's operative provisions proscribe the knowing provision or distribution of false copyright management information with the intent to facilitate or conceal infringement.[30] They also prohibit the intentional removal or alteration of copyright management information or the distribution of copies or phonorecords with the knowledge that copyright management information has been removed or altered, unless such actions are authorized by the copyright owner or the law.[31]

Title II of the DMCA, entitled the "Online Copyright Infringement Liability Limitation Act,"[32] adds Section 512 to the Copyright Act, which carves out four safe harbors from copyright liability for online service providers.[33] Section 512 reflects the result of extended negotiations between the telecommunications and content provider industries amidst considerable uncertainty regarding the extent to which online service providers may be held liable for direct, contributory, or vicarious copyright infringement for material placed on the service provider's network.[34]

***336** The first safe harbor concerns liability for transitory digital network communications.[35] The new Section 512(a) provides that a service provider shall not be liable for monetary relief for transmitting, routing, or providing connections for material through the provider's network or for the transient storage of such material in the course of such transmitting, routing, or providing connections so long as the service provider effectively acts as a common carrier without control over the content of the material or the identity of its recipients.[36]

The second safe harbor concerns system caching, principally the practice of making a resident copy of website material available on a system server in order to facilitate rapid user access to the material.[37] The new Section 512(b) provides that service providers shall not be liable for monetary relief for the intermediate and temporary storage of material on a system or network controlled by the service provider so long as a number of conditions are met. These conditions include that: (1) the material is made available online by a person (whom I will call the "Originator") other than the service provider and is transmitted from the Originator to another person (whom I will call the "Recipient") at the direction of the Recipient,[38] (2) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who request access to the material from the Originator,[39] (3) the material is transmitted to the Recipient without modification to its content,[40] (4) the service provider complies with rules concerning the updating of the material when specified by Originator in accordance with the applicable generally accepted industry standard data communications protocol,[41] (5) the service provider does not interfere with qualifying "cookie" or other such technology associated with the material to return the Originator the information that would have been available to the Originator had the Recipient obtained the material directly from the Originator,[42] and (6) the service provider accords access to the material only in accordance with any conditions that the Originator has placed on access, such as payment of a fee or provision of a password.[43] In addition, if (1) the Originator has placed the material online without the authorization of its copyright owner and (2) the material has previously been removed from the originating site, or access to it has been disabled (or a court has ***337** ordered that the material be removed from the originating site or that access to the material on the originating site be disabled), then the service provider will avoid liability only if it responds expeditiously to remove, or disable access to, the material upon a proper notification of claimed infringement.[44]

The third safe harbor pertains to information residing on systems or networks at the direction of users.[45] New Section 512(c) provides that a service provider will not be liable for monetary relief for storing such information provided that (1) the service provider does not have (i) actual knowledge that the material or an activity using the material on the system or network is infringing[46] or (ii) awareness of facts or circumstances from which infringing activity is apparent,[47] (2) upon obtaining such knowledge or awareness acts expeditiously to remove or disable access to the material,[48] (3) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity,[49] (4) upon receiving proper notification of claimed infringement, responds expeditiously to remove or disable access to the material that is claimed to be infringing or is the subject of infringing activity,[50] and (5) the service provider has appointed an agent to receive notification of claimed infringement and has made contact information available to the public through its service, including access on a website, and by providing such information to the Copyright Office.[51]

Section 512(c)(3) contains detailed provisions regarding the requirements for proper and effective notification of claimed infringement.[52] Of particular note, the notification must identify the copyrighted work claimed to have been infringed, identify the infringing material and provide information reasonably sufficient to enable a service provider to locate, and contain a statement that the complaining party has a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner or by law.[53]

The fourth safe harbor governs hypertext linking and other information location tools.[54] New Section 512(d) provides that a service provider will incur no ***338** liability for monetary relief for referring or linking users to an online location containing infringing material or infringing activity provided the service provider meets conditions regarding the absence of knowledge and the expeditious response to proper notification of claimed infringement that parallel those set forth in Section 512(c) regarding the user-generated resident information safe harbor.[55]

The four safe harbors do not merely encompass monetary relief.[56] New Section 512 also restricts the injunctive relief available against a service provider with respect to alleged infringing material or activity on the service provider's network falling within the province of one or more of the safe liability harbors.[57] Section 512(j) requires a court to tailor injunctive relief, to the extent possible, to the specific infringing material or activity or to account or access of the Originator of that material or activity.[58] Section 512(j)'s purpose is to avoid injunctions that would unnecessarily burden the service provider or the operation of the provider's network.[59]

The new Section 512 also provides that service providers will not be liable (either for money damages or an injunction) for removing or disabling access to material on the provider's network even if the material is ultimately determined to be noninfringing.[60] Where, however, the material resides on the network at the direction of a subscriber of the service provider, the service provider may avoid liability to its subscriber only if the provider complies with the notification requirements set forth in the statute.[61] If the service provider receives a counter notification from the subscriber meeting the requirements of Section 512(g)(3), the service provider must replace the removed material or cease disabling access to it within not less than ten and not more than fourteen days, unless the service provider first receives notice from the party complaining of the infringement that such person has sought a court order to restrain the subscriber from the purported infringing activity.[62]

Finally, Section 512(i) provides that none of the limitations on liability established by Section 512 (i.e., the four safe harbors and the liability limitations regarding removing or disabling access to material) will apply to a service provider ***339** unless the service provider has implemented and informed its subscribers of a policy of terminating subscribers who are repeat infringers and has accommodated "standard technical measures" used by copyright owners to identify and protect copyrighted works.[63]

Title III of the DMCA, entitled the "Computer Maintenance Competition Assurance Act," also addresses a matter of import and recent controversy.[64] A number of cases have held, in the context of computer maintenance by independent service providers, that the booting of a computer program by turning on the computer in which the program resides effects the making of a copy of the program, which may be infringing if not authorized by the copyright owner or the law.[65] Title III reverses the result of these cases. It adds to Section 117 of the Copyright Act a paragraph providing that it is not an infringement for the owner or lessee of a machine to make or authorize the making of a copy of a computer program if such copy is made solely by virtue of activating a machine that lawfully contains an authorized copy of the computer program, so long as the copy is made and used only to maintain or repair the machine and is destroyed immediately after the maintenance or repair is completed.[66]

Among other matters, Title IV of the DMCA amends Copyright Act provisions concerning limitations on the exclusive right of owners of the copyright in sound recordings to perform the work publicly by means of a digital audio transmission.[67] The Digital Performances Rights in Sound Recordings Act of 1995, which added that exclusive right to the panoply of copyright owner rights under the Copyright Act, was designed to meet the concern of interactive digital audio services that enable subscribers to call up (and tape) high quality digital recordings of their choice, thus impairing the market for cassettes and compact discs. Given Congress's primary focus on interactive digital audio services, Congress exempted from the new right traditional radio and television broadcasts, background music services, and transmissions in business establishments.[68] Home transmissions by noninteractive subscription services were made subject to compulsory licensing in the event ***340** voluntary licenses could not be negotiated.[69] The DMCA provides that webcasters are not exempt from the exclusive digital audio transmission right, but may qualify for compulsory licensing if they meet the detailed requirements set forth in the statute.[70]

B. Sonny Bono Copyright Term Extension Act

On October 27, 1998, President Clinton signed into law the "Sonny Bono Copyright Term Extension Act."[71] The Act extends the copyright term by twenty years.[72] Accordingly, for example, for works created on or after January 1, 1978, the standard term of protection is now the life of the author, plus 70 years, and the term of protection for works made for hire is now 95 years from publication or 120 years from creation, whichever is earlier.[73] Similarly, works created but not published before January 1, 1978 will now remain protected until December 31, 2027, but if such a work has been published by that date, it will remain protected until December 31, 2047.[74]

C. Fairness In Music Licensing Act of 1998

The Fairness In Music Licensing Act of 1998, also signed into law by President Clinton on October 27, 1998, expands the infringement exemption for businesses that transmit background music on their premises through radios and televisions.[75] Under prior law, such an establishment would infringe the public performance right in the musical works it transmitted unless it used a single radio or television set and receiver "of a kind commonly used in private homes" (or unless it obtained a performance license, generally from a performance right collecting society).[76] The Fairness in Music Licensing Act expands the single home-style apparatus portion of that exemption.[77] The Act provides a blanket exemption for any food or drinking establishment of less than 3,750 gross square feet and any other ***341** business establishments of less than 2,000 gross feet.[78] It also extends the exemption to larger establishments so long as audio performances are communicated by not more than six loudspeakers (of which not more than four may be in any one room) and the visual portion of audiovisual performances are communicated by not more than four audiovisual devices (of which not more than one may be in any one room and none may have a diagonal screen size greater than 55 inches).[79] As in prior law,[80] no establishment (whether large or small) may enjoy the exemption if it imposes a direct charge to see or hear the transmission or if it retransmits the transmission to the public.[81]

The Act also provides qualified establishments with an alternative for resolving fee disputes with a performance right collecting society.[82] The two principal performance right collecting societies, ASCAP and BMI, operate pursuant to the terms of consent decrees issued in connection with an antitrust action brought by the Department of Justice.[83] Under the consent decrees, establishment proprietors who wish to obtain a performance right license, but who are unable to negotiate a license fee, may petition a judge of the Southern District of New York to fix a "reasonable fee."[84] The Fairness in Music Licensing Act enables such establishment proprietors to have their petition heard in "the place of holding court of a district court that is the seat of the Federal Circuit (other than the Court of Appeals for the Federal Circuit) in which the proprietor's establishment is located."[85] The proceeding is still to be held before "the judge of the court with jurisdiction over the consent decree," but that court may appoint a special master or magistrate to hear the proceeding.[86]

*342 III. Case Law

A. Copyrightability and Case Reports

In two separate decisions issued in the same litigation on the same day, the Second Circuit upheld declaratory judgments that the manufacture and marketing of compilations of judicial opinions stored on CD-ROM's did not infringe any copyright held by West Publishing Company in its case law reports.[87]

In the first decision, the court affirmed the judgment of the district court that West's Supreme Court Reporter and Federal Reporter case reports contain no copyrightable material other than their syllabi, headnotes, and key numbers.[88] West could not assert a copyright in the text of the federal judicial decisions since works created by federal employees during the course of their employment are not subject to copyright protection.[89] West claimed that each bound volume of its case reports constitutes a copyrightable compilation.[90] In this forum, however, plaintiff Hyperlaw, Inc., had requested a declaratory judgment that its copying of individual case reports, not entire volumes, was noninfringing.[91] At issue, therefore, was whether West's additions to the text of each case report are sufficiently original to qualify independently for copyright protection.[92]

West contended that the required modicum of creativity inhered in its (1) arrangement of information specifying the parties, court, and date of decision, (2) selection and arrangement of attorney information, (3) arrangement of information relating to subsequent procedural developments, and (4) selection of parallel and alternative citations.[93] The Second Circuit rejected West's contentions, concurring with the district court that West's additions reflect a thoroughly conventional choice between

very limited options.[94] The court accordingly declined to find that the district court committed clear error in ruling that those elements were insufficiently creative and original to qualify for copyright protection.[95]

***343** The second decision concerned the use by plaintiffs Hyperlaw, Inc. and Matthew Bender & Company of star pagination referring to the pagination in West's case reporters.[96] The Second Circuit ruled that the inclusion of star pagination in plaintiffs' CD-ROM compilations of judicial decisions did not infringe West's copyright in its compilation of judicial decisions.[97] West's primary contention was that star pagination to West's case reporters allows a user of plaintiffs' CD-ROM discs (by inputting a series of commands) to "perceive" West's copyright-protected arrangement of cases and that plaintiffs' products (when star pagination is added) were thus unlawful copies of West's arrangement.[98]

The court held, most fundamentally, that under a proper reading of the Copyright Act, the insertion of star pagination does not amount to infringement of West's arrangement of cases.[99] The court reasoned that "a CD-ROM disc infringes a copyrighted arrangement when a machine or device that reads it perceives the embedded material in the copyrighted arrangement or in a substantially similar arrangement."[100] In contrast, however, "a copyrighted arrangement is not infringed by a CD-ROM disc if a machine can perceive the arrangement only after another person uses the machine to re-arrange the material into the copyrightholder's arrangement."[101] Accordingly, held the court, though users of plaintiffs' CD-ROMs could use the star pagination to re-arrange the judicial decisions into West's arrangement, that does not mean that the use of star pagination infringes West's copyright, at least without some invitation by plaintiffs for its users to employ the star pagination in that manner.[102]

B. Derivative Works

In *Micro Star v. FormGen Inc.*,[103] the Ninth Circuit held that audiovisual displays generated when a computer game is run in conjunction with user-created levels for the game recorded on a CD-ROM may qualify as infringing derivative works of the game. The court reaffirmed the Ninth Circuit rule that in order to qualify as a potentially infringing derivative work, the work must exist in a concrete or permanent form and must substantially incorporate protected material from the ***344** preexisting work.[104] The court then ruled that both requirements were met in the case before it.[105] The audiovisual displays, the court found, were effectively described to the last detail in MAP files that were fixed in a CD-ROM.[106] In addition, the court held, the MAP files' detailed description of the audiovisual displays substantially incorporated elements from the "story" set forth in the underlying game, just as a book using the game's characters and plot elements would constitute a potentially infringing sequel.[107]

C. Loss of Copyright Protection

In *Dolman v. Agee*,[108] the Ninth Circuit held that plaintiff songwriter's songs, which were included in a motion picture without a separate copyright notice for the songs, did not enter the public domain when the motion picture was released. Citing *American Vitagraph, Inc. v. Levy*,[109] the court ruled that, for purposes of determining whether publication without notice invalidates a common law copyright, a motion picture is not published until it is in commercial distribution, i.e. when copies of the film are place in regional exchanges for distribution to theater operators.[110] The court further ruled that although a copyright certificate indicating that the motion picture was a published work creates a presumption that the film was published for purposes of investing statutory copyright on the listed publication date, a copyright certificate does not prove that the film was "published" for purposes of determining whether the common-law copyright was divested.[111]

In *Batjac Productions Inc. v. GoodTimes Home Video Corp.*,[112] the Ninth Circuit held that the publication of a motion picture effected the publication of an unpublished screenplay to the extent the screenplay was incorporated into the film. After the copyright registration for the film lapsed for nonrenewal and the film fell into the public domain, the defendant began producing and selling videocassettes containing the film.[113] Plaintiff then applied to register for copyright two intermediate drafts of the screenplay as "unpublished works" and brought an action ***345** against defendant videocassette producer and distributor for infringement of those works.[114]

The Copyright Office declined to register the portions of the screenplays contained in the motion picture.[115] The Office determined that the release of the motion picture published the motion picture and all its components, including the screenplay.[116] The Register of Copyrights then intervened in the action to defend its determination that the screenplays were in the public domain to the extent they were incorporated into the film.[117]

Plaintiff argued that the publication of the motion picture did not affect its copyright in the unpublished screenplays, citing Section 7 of the Copyright Act of 1909, which provides that the publication of a derivative work does not affect the validity of a subsisting copyright in the preexisting work.[118] In upholding the Copyright Office's determination, the Ninth Circuit rejected plaintiff's contention that Section 7 applied to the case at hand.[119] The court held that the reference to "subsisting copyright" in Section 7 refers only to statutory copyright in registered works, not to the common law copyright in unpublished works.[120] In this regard, the court held the Supreme Court's suggestion to the contrary in *Steward v. Abend*[121] was mere dictum.[122] To hold otherwise, stated the Ninth Circuit, would enable "unpublished" works to effectively resurrect copyright protection over derivative works that have already entered the public domain.[123]

The court emphasized that its reasoning was based on the fact that the same party—the plaintiff—had held publication rights in both the screenplays and the motion picture.[124] The court's holding, therefore, would appear to be limited to such situations.

Footnotes

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1 *See* Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998) (to be codified to amend scattered sections of 17 U.S.C. & 28 U.S.C. and to be codified at 17 U.S.C. §§ 512, 1201-1205, 1301-1332 & 28 U.S.C. § 4001).

2 *See* H.R. CONF. REP. NO. 105-796, at 63 (1998). Title I is entitled the "WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998." DMCA § 101, 112 Stat. at 2861.

3 *See* DMCA § 105, 112 Stat. at 2877 (indicating which provisions are to take effect immediately upon enactment and which are to take effect upon the entry into force of the WIPO Copyright Treaty).

4 *Id.* § 103, 112 Stat. at 2863-2876 (adding Ch. 12, §§ 1201-1205, to 17 U.S.C.).

5 *See id.* § 103, 112 Stat. at 2863-2872 (to be codified at 17 U.S.C. § 1201).

6 *See id.* § 103, 112 Stat. at 2863-2865 (to be codified at 17 U.S.C. § 1201(a)).

7 *Id.* § 103, 112 Stat. at 2865 (to be codified at 17 U.S.C. § 1201(a)(3)(B)). In turn, Section 1201(a)(3)(A) defines to "circumvent a technological measure" as "to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner." *Id.* (to be codified at 17 U.S.C. § 1201(a)(3)(A)).

8 *Id.* § 103, 112 Stat. at 2863-64 (to be codified at 17 U.S.C. § 1201(a)(1)(A)).

9 *See, e.g.*, H.R. COMM. REP. NO. 105-551 Pt. 2, at 25-26 (1998).

10 *See* DMCA § 103, 112 Stat. at 2864 (to be codified at 17 U.S.C. § 1201(a)(1)(A)).

11 *See id.* § 103, 112 Stat. at 2864 (to be codified at 17 U.S.C. § 1201(a)(1)(C)).

12 *See id.*

[13] *See id.* § 103, 112 Stat. at 2864 (to be codified at 17 U.S.C. § 1201(a)(1)(D)).

[14] *Id.* § 103, 112 Stat. at 2865 (to be codified at 17 U.S.C. § 1201(b)(1)(A)).

[15] *See id.* § 103, 112 Stat. at 2864-65 (to be codified at 17 U.S.C. § 1201(a)-(b)).

[16] *See id.*

[17] *Id.* (to be codified at 17 U.S.C. § 1201(b)(1)(C)).

[18] *See id.* (to be codified at 17 U.S.C. § 1201(b)(2)(B)).

[19] *See, e.g.*, Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330, 1333, 36 U.S.P.Q.2d (BNA) 1028, 1030 (9th Cir. 1995).

[20] *See* DMCA § 103, 112 Stat. at 2865 (to be codified at 17 U.S.C. § 1201(b)).

[21] *See id.* § 103, 112 Stat. at 2866-2870 (to be codified at 17 U.S.C. § 1201(d)-(j)).

[22] *Id.* § 103, 112 Stat. at 2866 (to be codified at 17 U.S.C. § 1201(d)(1)).

[23] *Id.* (to be codified at 17 U.S.C. § 1201(d)(2)).

[24] *See id.* § 103, 112 Stat. at 2866-67 (to be codified at 17 U.S.C. § 1201(f)).

[25] *Id.* § 103, 112 Stat. at 2866 (to be codified at 17 U.S.C. § 1201(f)(1)).

[26] *Id.* § 103, 112 Stat. at 2867 (to be codified at 17 U.S.C. § 1201(f)(1)). A parallel provision allows someone to "develop and employ" circumvention technology for reverse engineering. *Id.* (to be codified at 17 U.S.C. § 1201(f)(2)).

[27] *See* Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1527-28, 24 U.S.P.Q.2d (BNA) 1561, 1574 (9th Cir. 1992) (holding that intermediate copying necessary to achieve interoperability constituted fair use); Atari Games Corp. v. Nintendo of Am., Inc., 975 F.2d 832, 844, 24 U.S.P.Q.2d (BNA) 1015, 1024 (Fed. Cir. 1992) (intermediate copying required to understand a program's functions may constitute fair use).

[28] *See* DMCA § 103, 112 Stat. at 2872-2874 (to be codified at 17 U.S.C. § 1202).

[29] *Id.* § 103, 112 Stat. at 2873 (to be codified at 17 U.S.C. § 1202(c)).

[30] *See id.* § 103, 112 Stat. at 2872 (to be codified at 17 U.S.C. § 1202(a)).

[31] *See id.* (to be codified at 17 U.S.C. § 1202(b)).

[32] *Id.* § 201, 112 Stat. at 2877.

[33] *See id.* § 202, 112 Stat. at 2877-2886 (to be codified at 17 U.S.C. § 512). New Section 512(l) of the Copyright Act provides that "[t]he failure of a service provider's conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider's conduct is not infringing under this title or any other defense." *Id.* § 202, 112 Stat. at 2886 (to be codified at 17 U.S.C. § 512(l)).

[34] *See* Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361, 1373-75, 37 U.S.P.Q.2d (BNA) 1545, 1554-55 (N.D. Cal. 1995) (Internet service provider not liable for direct infringement for subscriber's posting of infringing material, but may be liable for contributory infringement if it had knowledge of subscriber's infringing activity); Sega Enters. Ltd. v. MAPHIA, 948 F. Supp. 923, 933, 41 U.S.P.Q.2d (BNA) 1705, 1712-13 (N.D. Cal. 1996) (given knowledge, BBS operator liable for contributory infringement for subscriber's infringing posting); Marobie-Fl., Inc. v. National Ass'n of Fire & Equip. Distribs., 983 F. Supp. 1167, 1178, 45 U.S.P.Q.2d (BNA) 1236, 1245 (N.D. Ill. 1997) (webserver who hosts web page containing infringing material is liable for direct infringement, but online service provider who merely "automatically serves up a copy of the request file" to Internet users has no liability).

[35] *See* DMCA § 202, 112 Stat. at 2877-78 (to be codified at 17 U.S.C. § 512(a)).

[36] *See id.*

[37] *See id.* § 202, 112 Stat. at 2878-2879 (to be codified at 17 U.S.C. § 512(b)).

[38] *See id.* § 202, 112 Stat. at 2878 (to be codified at 17 U.S.C. § 512(b)(1)(A)-(B)).

[39] *See id.* (to be codified at 17 U.S.C. § 512(b)(1)(C)).

[40] *See id.* (to be codified at 17 U.S.C. § 512(b)(2)(A)).

[41] *See id.* § 202, 112 Stat. at 2878-79 (to be codified at 17 U.S.C. § 512(b)(2)(B)).

[42] *See id.* § 202, 112 Stat. at 2879 (to be codified at 17 U.S.C. § 512(b)(2)(C)).

[43] *See id.* (to be codified at 17 U.S.C. § 512(b)(2)(D)).

[44] *See id.* § 202, 112 Stat. at 2879 (to be codified at 17 U.S.C. § 512(b)(2)(E)).

[45] *See id.* § 202, 112 Stat. at 2879-80 (to be codified at 17 U.S.C. § 512(c)).

[46] *See id.* § 202, 112 Stat. at 2880 (1998) (to be codified at 17 U.S.C. § 512(c)(1)(A)(i)).

[47] *See id.* (to be codified at 17 U.S.C. § 512(c)(1)(A)(ii)).

[48] *See id.* (to be codified at 17 U.S.C. § 512(c)(1)(A)(iii)).

[49] *See id.* (to be codified at 17 U.S.C. § 512(c)(1)(B)).

[50] *See id.* § 202, 112 Stat. at 2880 (to be codified at 17 U.S.C. § 512(c)(1)(C)).

[51] *See id.* § 202, 112 Stat. at 2880 (to be codified at 17 U.S.C. § 512(c)(2)).

[52] *See id.* § 202, 112 Stat. at 2880-81 (to be codified at 17 U.S.C. § 512(c)(3)).

[53] *See id.* § 202, 112 Stat. at 2881 (to be codified at 17 U.S.C. § 512(c)(3)(A)(v)).

[54] *See id.* § 202, 112 Stat. at 2881 (to be codified at 17 U.S.C. § 512(d)).

[55] *See id.*

[56] *See id.* § 202, 112 Stat. at 2885-86 (to be codified at 17 U.S.C. § 512(j)).

[57] *See id.* § 202, 112 Stat. at 2885 (to be codified at 17 U.S.C. § 512(j)(1)(A)).

[58] *See id.* (to be codified at 17 U.S.C. § 512(j)(1)).

[59] *See id.* (to be codified at 17 U.S.C. § 512(j)(2), requiring courts to take the possibility of such a burden, as well as other factors, into account in formulating injunctive relief).

[60] *See id.* § 202, 112 Stat. at 2882-83 (to be codified at 17 U.S.C. § 512(g)).

[61] *See id.* (to be codified at 17 U.S.C. § 512(g)(2)).

[62] *See id.* § 202, 112 Stat. at 2883 (to be codified at 17 U.S.C. § 512(g)(2)(C)).

[63] *Id.* § 202, 112 Stat. at 2884 (to be codified at 17 U.S.C. § 512(i)).

[64] *See id.* § 302, 112 Stat. at 2887 (to be codified to amend 17 U.S.C. § 117 (1994)).

[65] *See, e.g.*, MAI Sys. v. Peak Computer, 991 F.2d 511, 519, 26 U.S.P.Q.2d (BNA) 1458, 1464 (9th Cir. 1993).

[66] *See* DMCA § 302, 112 Stat. at 2887 (to be codified at 17 U.S.C. § 117(c)). The new paragraph also provides that "with respect to any computer program or part thereof that is not necessary for that machine to be activated, such program or part thereof" may not be "accessed or used other than to make" the new copy of the computer program "by virtue of the activation of the machine." *Id.* (to be codified at 17 U.S.C. § 117(c)(2)).

[67] *See* DMCA § 405, 112 Stat. at 2890-2902 (to be codified to amend 17 U.S.C. §§ 112, 114, 802-803). The digital audio transmission right is set forth in 17 U.S.C. § 106(6). *See* 17 U.S.C.A. § 106(6) (1996 & Supp. 1998). The limitations on the right are delineated in 17 U.S.C. § 114(d). *See* 17 U.S.C.A. § 114(d) (1996 & Supp. 1998).

[68] *See* 17 U.S.C.A. § 106(6) (1996 & Supp. 1998).

[69] *See* 17 U.S.C.A. § 114 (1996 & Supp. 1998).

[70] *See* DMCA § 405, 112 Stat. at 2890-2902 (to be codified to amend 17 U.S.C. §§ 112, 114, 802-803).

[71] *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 101, 112 Stat. 2827, 2827 (1998).

[72] *See id.* § 102, 112 Stat. at 2827-2829 (to be codified to amend 17 U.S.C. §§ 108, 203, 301-304 (1994)).

[73] *See id.* § 102(b), 112 Stat. at 2827 (to be codified to amend 17 U.S.C. § 302 (1994)).

[74] *See id.* § 102(c), 112 Stat. at 2827 (to be codified to amend 17 U.S.C. § 303 (1994)).

[75] *See* Fairness In Music Licensing Act of 1998, Pub. L. No. 105-298, §§ 202-205, 112 Stat. 2827, 2830-2834 (to be codified to amend 17 U.S.C. § 110 and to be codified at 17 U.S.C. § 512).

[76] 17 U.S.C.A. § 110(5) (1996), *amended by* Fairness In Music Licensing Act §§ 202-205, 112 Stat. at 2830-2834.

[77] *See* Fairness In Music Licensing Act § 202(a), 112 Stat. at 2830-31 (to be codified at 17 U.S.C. § 110(5)(B)).

[78] *See id.*

[79] *See id.*

[80] *See* 17 U.S.C.A. 110(5) (1996), *amended by* Fairness In Music Licensing Act §§ 202-205, 112 Stat. at 2830-2834.

[81] *See* Fairness In Music Licensing Act § 202, 112 Stat. at 2831 (to be codified at 17 U.S.C. § 110(5)(B)(iii)(iv)).

[82] *See id.* § 203, 112 Stat. at 2831-33 (to be codified at 17 U.S.C. § 512).

[83] *See* Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 10-12, 201 U.S.P.Q. (BNA) 497, 501-02 (1979) (describing ASCAP and BMI consent decrees).

[84] *See* United States v. ASCAP, 1950-51 Trade Cas. (CCH) ¶ 62,595, at 63,754 (§ IX(A)) (S.D.N.Y. 1950) (Amended Final Judgment).

[85] Fairness In Music Licensing Act § 203, 112 Stat. at 2832 (to be codified at 17 U.S.C. § 512(2)).

[86] *Id.* (to be codified at 17 U.S.C. § 512(3)).

[87] *See* Matthew Bender & Co. v. West Publ'g Co. (Matthew Bender I), 158 F.3d 674, 681, 48 U.S.P.Q.2d (BNA) 1560, 1567 (2d Cir. 1998); Matthew Bender & Co. v. West Publ'g Co. (Matthew Bender II), 158 F.3d 693, 691, 48 U.S.P.Q.2d (BNA) 1545, 1547 (2d Cir. 1998).

[88] *See Matthew Bender I*, 158 F.3d at 677, 48 U.S.P.Q.2d at 1562.

[89] *See* 17 U.S.C.A. § 105 (1996).

[90] *See Matthew Bender I*, 158 F.3d at 677, 48 U.S.P.Q.2d at 1562.

[91] *See id.* at 678, 48 U.S.P.Q.2d at 1562.

[92] *See id.* at 680, 48 U.S.P.Q.2d at 1565.

[93] *See id.* at 681, 48 U.S.P.Q.2d at 1567.

[94] *See id.*

[95] *See id.*

[96] *See Matthew Bender II*, 158 F.3d at 693, 48 U.S.P.Q.2d at 1546.

[97] *See id.* at 696, 48 U.S.P.Q.2d at 1547.

[98] *Id.* at 695-96, 48 U.S.P.Q.2d at 1546-47.

[99] *See id.* at 708, 48 U.S.P.Q.2d at 1555.

[100] *Id.* at 702, 48 U.S.P.Q.2d at 1552.

[101] *Id.*

[102] *See id.*, 48 U.S.P.Q.2d at 1555.

[103] 154 F.3d 1107, 1111, 48 U.S.P.Q.2d (BNA) 1026, 1029 (9th Cir. 1998).

[104] *See id.* at 1111, 48 U.S.P.Q.2d at 1028 (citing Lewis Galoob Toys, Inc. v. Nintendo of Am. Inc., 964 F.2d 965, 967, 22 U.S.P.Q.2d (BNA) 1857, 1859 (9th Cir. 1992)).

[105] *See id.*, 48 U.S.P.Q.2d at 1029.

[106] *See id.*

[107] *Id.* at 1112, 48 U.S.P.Q.2d at 1030.

[108] 157 F.3d 708, 714, 48 U.S.P.Q.2d (BNA) 1305, 1309 (9th Cir. 1998).

[109] 659 F.2d 1023, 213 U.S.P.Q. (BNA) 31 (9th Cir. 1981).

[110] *See Dolman*, 157 F.3d at 714, 48 U.S.P.Q.2d at 1308-09.

[111] *Id.* at 714, 48 U.S.P.Q.2d at 1309.

[112] 160 F.3d 1223, 1235, 48 U.S.P.Q.2d (BNA) 1647, 1657-58 (9th Cir. 1998).

[113] *See id.* at 1225, 48 U.S.P.Q.2d at 1649.

[114] *Id.*

[115] *See id.*

[116] *See id.*

[117] *See id.* at 1225, 48 U.S.P.Q.2d at 1649.

[118] *See id.* at 1227, 48 U.S.P.Q.2d at 1650.

[119] *See id.* at 1228, 48 U.S.P.Q.2d at 1653.

[120] *Id.* at 1227, 48 U.S.P.Q.2d at 1650.

[121] 495 U.S. 209. 14 U.S.P.Q.2d (BNA) 1614 (1990).

[122] *Batjac Prods.*, 160 F.3d at 1230, 48 U.S.P.Q.2d at 1655.

[123] *Id.* at 1235, 48 U.S.P.Q.2d at 1655.

[124] *See id.* at 1236, 48 U.S.P.Q.2d at 1655.

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