

THE MOVIE EMPIRE STRIKES BACK: 321 *STUDIOS* v. *MGM STUDIOS*

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I. INTRODUCTION

In 1984, the U.S. Supreme Court decided *Sony v. Universal*,¹ announcing to the legal community the standard for contributory copyright infringement in a new era of copy-making technologies. The concept of substantial non-infringing use,² introduced by the *Sony* decision, remained the standard of contributory copyright infringement for technology manufacturers for years. In 1998, however, Congress introduced the Digital Millennium Copyright Act (“DMCA”),³ which effectively superceded the *Sony* decision. The DMCA came with the promise that no rights, including fair use rights, would be abridged by its enactment.⁴ In the decisions applying the DMCA’s standards, however, it has become increasingly clear that although one still has the right to make fair use copies of copyrighted material, courts have no obligation to make the practice simple, or even technically possible. Because the DMCA has so substantially abridged the ability of individuals or organizations to distribute copy-making technology, litigants have challenged its interpretation and constitutionality since its inception.⁵ One of the latest in this string of cases is *321 Studios v. Metro Goldwyn Mayer Studios*.⁶

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1. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

2. *Id.* at 441.

3. 17 U.S.C. § 1201 (2000).

4. 17 U.S.C. § 1201(c)(1).

5. *See Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001), *aff’g* *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 346 (S.D.N.Y. 2000); *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002).

6. 307 F. Supp. 2d 1085 (N.D. Cal. 2004).

II. BACKGROUND

A. DVD Technology

Although “DVD” stands for “digital versatile disc,”⁷ the technology is typically known by its acronym. DVDs are the most recent method for presenting video content to a mass market. Because DVDs encode video in a digital format, they allow content to be presented at near-studio quality, unlike a tape-driven video format such as a video cassette.⁸ In addition, content providers can use the DVD format to include many “bonus features,” such as “alternate endings, deleted scenes, . . . commentary . . . and other menu-driven options that are not available on . . . any other format.”⁹

Because digital copying allows for the creation of near-perfect copies,¹⁰ there is great demand for technology that allows users to make copies of material presented in the DVD format. To prevent the copying of DVDs, most studios releasing films in this format encode the content of the discs with the “content scramble system” (“CSS”).¹¹ Only a DVD player equipped with a CSS descrambler is able to read and play encoded DVDs.¹² DVD player manufacturers license the right to decode CSS from the Copyright Control Authority (“CCA”).¹³ Because consumers are unable to decode a DVD without a CSS descrambler, CSS also prevents users from copying the content of a DVD.¹⁴

B. A Brief History of DeCSS

The world is filled with people who want to make copies of DVDs, whether for arguably legitimate purposes, such as backing up their movie collection, or illegal purposes, such as distributing copyrighted material without authorization. This demand, combined with the existence of hackers who measure their skill by the ability to crack encryption schemes, signified that it was only a matter of time before someone would develop technology for circumventing CSS.

7. Rich D’Ambrise, A Closer Look at DVD, at <http://www.cdinfo.com/CDIC/Technology/DVD/dvd.html> (last visited Aug. 1, 2004).

8. Jim Taylor, DVD Frequently Asked Questions (and Answers), § 1.3, at <http://www.dvddemystified.com/dvdfaq.html> (last modified Sept. 13, 2004).

9. *321 Studios*, 307 F. Supp. 2d at 1089.

10. Special Libraries Association, *Copyright: The Digital Dilemma— National Research Council Report*, INFO. OUTLOOK (Apr. 2000), available at http://www.findarticles.com/p/articles/mi_m0FWE/is_4_4/ai_62002130.

11. DVD Copy Control Association, Frequently Asked Questions (FAQ), at <http://www.dvdcca.org/faq.html> (last visited Aug. 1, 2004).

12. *Id.*

13. *Id.*

14. *Id.*

In 1999, a Norwegian teenager named Jon Johansen¹⁵ posted a program on the Internet entitled “DeCSS.”¹⁶ This program enabled computers without CSS-decoding chips to play encoded DVDs.¹⁷ Johansen originally designed DeCSS for the purpose of creating DVD-playing software that would work under the Linux operating system. However, once released, the code quickly proliferated across the Internet and is now readily available for anyone with an Internet connection and the intent to play or copy DVDs regardless of CSS encoding.¹⁸ The creation of this code initiated a slew of litigation both in the United States and abroad.¹⁹

C. History of the Case

Historically, the DeCSS code was spread across the smaller, lesser-known Web sites of Internet users who wanted to combat what they saw as the tyranny of copyright law and the dominance of the Motion Picture Association of America (“MPAA”), an organization comprised of the largest movie studios in the United States.²⁰ In time, however, companies began to see the opportunity for profit in distributing the code on a larger scale to those who might not be sufficiently technologically savvy to use the code on their own.

This is where 321 Studios entered the picture. In 2001 and 2002, 321 Studios produced the “DVD Copy Plus” and “DVD X Copy” software.²¹ These programs enabled users to copy the entirety or parts of DVDs, regardless of whether the data on the DVDs was encoded.²² To achieve

15. Jon Johansen, sometimes referred to as “DVD Jon,” is infamous for defeating content protection schemes. In August 2004, Johansen released “JustePort” on his Web site, a tool that cracks the encryption of Apple Computer’s Airport Express technology. Posting of Jon Johansen, *So Sue Me* (Aug. 11, 2004), at <http://www.nanocrew.net/blog/>.

16. The Openlaw DVD/DeCSS Forum Frequently Asked Questions (FAQ) List, § 1.3.1, at <http://cyber.law.harvard.edu/openlaw/DVD/dvd-discuss-faq.html> (last modified May 3, 2000).

17. See generally Andy Patrizio, *Why the DVD Hack Was a Cinch*, WIRE (Nov. 2, 1999), available at <http://www.wired.com/news/technology/0,1282,32263,00.html>.

18. See, e.g., DeCSS Central, Appendix: Software, at <http://www.lemuria.org/DeCSS/decss.html> (last visited Aug. 1, 2004); Carnegie Mellon University, Computer Science Department, Gallery of CSS Descramblers, at <http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery/> (last visited Aug. 1, 2004); Mr. Bad, Pigdog Journal DeCSS Distribution Center, at <http://www.pigdog.org/decss> (last updated Feb. 16, 2000).

19. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085 (N.D. Cal. 2004); John Leyden, *DVD Jon Is Free—Official*, THE REGISTER (Jan. 7, 2003), at http://www.theregister.co.uk/2003/01/07/dvd_jon_is_free_official.

20. See DeCSS Central, *supra* note 18; Carnegie Mellon University, *supra* note 18; Mr. Bad, *supra* note 18.

21. See generally Robin Good, *Creating Exact DVD Copies for Backup Purposes*, MASTER MIND EXPLORER (Dec. 31, 2002), at http://www.masternewmedia.org/2002/12/31/creating_exact_dvd_copies_for_backup_purposes.htm; 321 Studios, at <http://www.321studios.com/support.asp> (last visited Aug. 1, 2004).

22. *321 Studios*, 307 F. Supp. 2d at 1089.

this effect, the software incorporated the DeCSS code in order to circumvent the CSS protection on the DVDs.²³

Knowing that the movie studios would certainly object to the distribution of this software, in April 2002, 321 Studios filed a complaint for declaratory judgment against a number of movie studios (collectively "MGM"), asserting that its software violated neither the DMCA nor other copyright law provisions; or, in the alternative, that the DMCA is unconstitutional.²⁴ MGM's motion for summary judgment was heard in the Northern District of California by Judge Susan Illston and decided in February 2004.²⁵ Relying heavily on two previous DMCA cases,²⁶ the court analyzed 321 Studios' behavior under §§ 1201(a)(2) and 1201(b)(1) of the DMCA and considered whether the DMCA was unconstitutional under the First Amendment, the Commerce Clause, the Intellectual Property Clause, or the Necessary and Proper Clause.²⁷

III. THE DECISION

A. Precedent Cases

The *321 Studios* decision relied heavily upon two cases, *Universal City Studios, Inc. v. Corley*²⁸ and *United States v. Elcom Ltd.*,²⁹ as precedent for addressing whether 321 Studios' software violated the DMCA.

1. Corley

In *Corley*, as in *321 Studios*, the legality of DeCSS was at issue.³⁰ The district court enjoined Corley from distributing or linking his Web site to other sites that distributed the DeCSS code.³¹ On appeal, the defendants made a number of constitutional arguments against the DMCA, including that it violated the First Amendment and the Copyright Clause by unduly restricting free speech and fair use.³²

The Second Circuit affirmed the district court's opinion, holding that the challenge based on the Copyright Clause was premature and

23. Tony Smith, *Judge Bans DVD X Copy Software*, THE REGISTER (Feb. 23, 2004), at http://www.theregister.co.uk/2004/02/23/judge_bans_dvd_x_copy.

24. *321 Studios*, 307 F. Supp. 2d at 1089–90.

25. *Id.* at 1085.

26. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002).

27. See generally *321 Studios*, 307 F. Supp. 2d at 1085–1108.

28. 273 F.3d at 429.

29. 203 F. Supp. 2d at 1111.

30. *Corley*, 273 F.3d at 434.

31. *Id.* at 434–35.

32. *Id.* at 443–59.

speculative;³³ intermediate scrutiny was appropriate for review under the First Amendment;³⁴ under intermediate scrutiny, the injunction did not unduly burden the defendants' right to free speech;³⁵ and the DMCA did not unconstitutionally limit fair use.³⁶

2. *Elcom*

Elcom involved the criminal prosecution of several defendants under the DMCA.³⁷ Adobe Systems released a product called "eBook." The eBook software allowed users to read a book only on the computer on which it was downloaded, thus it could not be copied to another computer.³⁸ The defendants created software that decoded the eBook software, allowing users to copy the eBook files.³⁹ The defendants first argued that the DMCA was unconstitutionally vague as applied to them; second, that it violated their First Amendment rights because it was a content-based restriction and not narrowly tailored to serve a compelling government interest;⁴⁰ and, third, that the DMCA obstructed the fair use rights of third parties.⁴¹

The court rejected all of the defendants' arguments, holding that the DMCA was not unconstitutionally vague;⁴² although computer code is speech protected by the First Amendment, the DMCA is sufficiently specific and adequately protects legitimate and substantial government interests;⁴³ and the DMCA does not violate the fair use rights of third parties.⁴⁴

B. *The DMCA*

1. *Section 1201(a)(2)*

The first issue addressed by the *321 Studios* court was whether 321 Studios' conduct violated the DMCA. Section 1201(a)(2) of the DMCA prohibits the manufacture or distribution of technology that circumvents access-control measures.⁴⁵ The section states:

33. *Id.* at 444–45.

34. *Id.* at 453.

35. *Id.* at 455.

36. *Id.* at 459.

37. *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1119 (N.D. Cal. 2002).

38. *Id.* at 1117–18.

39. *Id.* at 1118–19.

40. *Id.* at 1122.

41. *Id.*

42. *Id.* at 1125.

43. *Id.* at 1130–32.

44. *Id.* at 1135.

45. 17 U.S.C. § 1201(a)(2) (2000).

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

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

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.⁴⁶

First, 321 Studios argued that CSS is not a “technological measure that effectively controls access” to a copyrighted work because CSS keys are widely available on the Internet.⁴⁷ The court rejected this argument by analogizing it to the purchase of skeleton keys on the Internet: the purchase of a skeleton key would not make a deadbolt an ineffective way to control access to a door.⁴⁸ The court found that the plain language of the statute supported MGM's position because one must purchase a CSS key from the CCA to *lawfully* gain access to copyrighted DVD content.⁴⁹ Therefore, CSS effectively controls access to the copyrighted works on DVDs.⁵⁰

MGM argued that 321 Studios' software violated all three provisions of § 1201(a)(2): it was designed for the purpose of circumventing CSS, has only a limited commercially significant purpose other than circumventing CSS, and was marketed for the use of circumventing CSS.⁵¹ In response, 321 Studios argued that it had not circumvented CSS because under § 1201(a)(3)(A), one can only circumvent a technological measure if one does so without the authority of the copyright holder.⁵² Since the software was designed for use with original DVDs and the purchaser of a DVD has the authority of the copyright holder to view the DVD after purchase, he is not circumventing CSS when he chooses to view the DVD on a different platform.⁵³

On this issue, the court held in favor of MGM. Following the reasoning in *Corley*, the court found a crucial difference between viewing and decrypting a DVD. Although a DVD purchaser may be entitled to

46. *Id.*

47. *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1095 (N.D. Cal. 2004).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 1096.

52. *Id.*

53. *Id.*

view the DVD, he is not entitled to decrypt it.⁵⁴ The only entities that are allowed to decrypt DVDs are those companies that have legally licensed CSS keys from the CCA.⁵⁵ As a result, the court found 321 Studios to be in violation of § 1201(a)(2).⁵⁶

2. Section 1201(b)(1)

Section 1201(b)(1) prevents the manufacture or trafficking of any technology that circumvents copy-control measures.⁵⁷ The section states:

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

(A) 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 this title in a work or a portion thereof;

(B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.⁵⁸

The first argument by 321 Studios under this section was that CSS is not a copy-control measure because it only prevents access, not copying; therefore, it would not fall within this section.⁵⁹ The court found this argument unconvincing. While it is technically correct that CSS only prevented access to the DVDs, the purpose of that controlled access was to prevent copying.⁶⁰ The content on the DVDs could not be copied unless it was first decrypted.⁶¹ As a result, the court found that CSS is a copy-control measure and, accordingly, within the scope of § 1201(b)(1).⁶²

Next, 321 Studios argued that the software was not in violation of § 1201(b)(1) because the primary use of the software does not violate any

54. *Id.*

55. *Id.* at 1095.

56. *Id.* at 1096.

57. 17 U.S.C. § 1201(b)(1) (2000).

58. *Id.*

59. *321 Studios*, 307 F. Supp. 2d at 1096–97.

60. *Id.*

61. *Id.*

62. *Id.* at 1097.

of the copyright holder's rights.⁶³ The software is mainly used for making copies of DVDs composed of content in the public domain, back-up copies of legally purchased DVDs, and copies for fair use.⁶⁴ The court found this argument to be unpersuasive because it was not the software users' actions that were under scrutiny, but 321 Studios' actions.⁶⁵ Trafficking, not the use of circumventing technology, was banned by the DMCA.⁶⁶ The court then followed both the *Corley* and *Elcom* decisions, holding that legal use by customers is not a defense to a violation of § 1201(b)(1) by a software manufacturer.⁶⁷ Accordingly, the court held that 321 Studios had violated both §§ 1201(a)(2) and (b)(1).⁶⁸

C. Constitutionality of the DMCA

1. First Amendment

a. Speech

The first constitutional issue was whether the DMCA unduly restricted 321 Studios' speech under the First Amendment by preventing the communication of how to make fair use of copyrighted works.⁶⁹ There has been much commentary on whether computer code constitutes speech under the First Amendment.⁷⁰ The court here followed numerous prior cases, concluding that "both the executable object code and the more readable source code⁷¹ merit First Amendment protection."⁷²

While code may merit First Amendment protection, the parties disputed the appropriate level of scrutiny for reviewing the restriction imposed by the DMCA.⁷³ It was argued by 321 Studios that the regulation imposed a content-specific restriction on speech, therefore

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 1097–98.

68. *Id.* at 1099.

69. *Id.*

70. See, e.g., Robert Plotkin, *Fighting Keywords: Translating the First Amendment to Protect Software Speech*, 2003 U. ILL. J.L. TECH. & POL'Y 329.

71. The code produced by a computer programmer written in a programming language such as C++ or Java is called source code. When the source code is entered into a compiler, it is transformed into object code. Object code is less readable than source code, and closer to machine language, which comprises the instructions that a computer can execute. Object code is then put through a program such as an assembler, which translates it into machine language, comprised of ones and zeros, which the computer can understand. See *321 Studios*, 307 F. Supp. 2d at 1099; WEBOPEDIA, at http://www.webopedia.com/TERM/O/object_code.html (last visited Aug. 29, 2004) (defining object code).

72. *321 Studios*, 307 F. Supp. 2d at 1099.

73. *Id.*

strict scrutiny was appropriate.⁷⁴ The court, however, found that the regulation was content neutral and subject only to intermediate scrutiny.⁷⁵ The reasoning underlying this decision was that the code at issue consisted of both speech and a functional element.⁷⁶ The DMCA prohibited the functional element of the code, i.e., the manner in which it circumvented CSS.⁷⁷ Since the regulation had nothing to do with the message conveyed by the code to the message's recipients, it was to be considered content neutral.⁷⁸ The prohibition was based entirely on its function, not its message.

The judicial test for examining speech under intermediate scrutiny is that "the regulation will be upheld if it furthers an important or substantial government interest unrelated to the suppression of free expression, and if the incidental restrictions on First Amendment freedoms are no greater than essential to the furtherance of that interest."⁷⁹ The court found that because the DMCA met this standard, it should be upheld.⁸⁰

b. Fair Use

Next, 321 Studios challenged the DMCA as a violation of the First Amendment with respect to the fair use rights of the software's users. Both sections of the DMCA addressed in this opinion are subject to the caveat of § 1201(c)(1), which states that "[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title."⁸¹ But 321 Studios contended that, under *Eldred v. Ashcroft*,⁸² users have a First Amendment right to make fair use copies of copyrighted material.⁸³ However, the court recognized that while the First Amendment zealously protects a person's right to make his own speech, it offers less protection when one wishes to make someone else's speech.⁸⁴

The court held that the DMCA did not unduly burden users' rights to make fair use of copyrighted works.⁸⁵ The court reasoned that while users have an absolute right to exercise their fair use rights, there is no guarantee that they be able to do it by the most effective or technologically advanced means.⁸⁶ Even without the use of CSS, the

74. *Id.*

75. *Id.* at 1101.

76. *Id.* at 1100 (citing *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 454 (2d Cir. 2001)).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 1101.

81. 17 U.S.C. § 1201(c)(1) (2000).

82. 537 U.S. 186 (2003).

83. *321 Studios*, 307 F. Supp. 2d at 1101.

84. *Id.*

85. *Id.*

86. *Id.*

court found that users could make copies from non-protected DVDs or other analog sources under the guise of fair use.⁸⁷ Although finding alternative methods of copying might impose a financial burden on users, such a burden may only render a statute unconstitutional if it unduly restricts the content of the speech.⁸⁸

Furthermore, 321 Studios argued that the DMCA unfairly restricted speech by prohibiting the copying of public domain works in addition to copyrighted works.⁸⁹ The court used the same reasoning as with the previous issue to find that the public domain works were still accessible by copying non-protected DVDs or accessing and copying non-digital formats.⁹⁰

2. *Scope of Congress's Power*

The next challenge to the DMCA's constitutionality was whether Congress exceeded its authority under the Commerce, the Necessary and Proper, and/or the Intellectual Property Clauses of the Constitution in enacting the statute.⁹¹

The court, quoting liberally from *Elcom*, first found that the DMCA was within the scope of Congress's power under the Commerce Clause.⁹² The Commerce Clause grants Congress the power to regulate anything affecting interstate commerce.⁹³ The court found that the trafficking or marketing of circumvention devices affects interstate commerce; therefore, the DMCA was within Congress's power to enact under the Commerce Clause.⁹⁴ As a result of this finding, the court felt it was unnecessary to delve into 321 Studios' arguments concerning the Necessary and Proper Clause.⁹⁵

Once again quoting *Elcom*, the court found that the DMCA did not run afoul of the Intellectual Property Clause of the Constitution.⁹⁶ The Intellectual Property Clause states that Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁹⁷ First, the court determined that the DMCA, by preventing the trafficking of tools that aid in piracy, followed the purpose of copyright law—the promotion of science by

87. *Id.* at 1102.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1103.

92. *Id.*

93. U.S. CONST. art. I, § 8, cl. 3.

94. *321 Studios*, 307 F. Supp. 2d at 1103.

95. *Id.* at 1104 n.4.

96. *Id.* at 1103–04.

97. U.S. CONST. art. I, § 8, cl. 8.

granting authors and inventors exclusive rights in their creations.⁹⁸ The court then turned to the question of whether the DMCA was prevented by the Intellectual Property Clause's limitations that protect fair use and the public domain. This analysis was largely similar to the fair use analysis.⁹⁹ The court concluded that it was still possible to maintain a robust public domain and engage in fair use despite the limitations placed on DVD copying by the DMCA.¹⁰⁰ The court reiterated that just because one is guaranteed the right to access public domain works or make fair use of copyrighted works, one does not necessarily have the right to use the most technologically advanced or effective means to do so.¹⁰¹

3. Relief Granted

After finding that 321 Studios had violated §§ 1201(a)(2) and (b)(1), that the DMCA did not violate any provisions of the Constitution, and that the DMCA was within Congress's power to enact under the Constitution, the court turned to the issue of relief for the movie studios. The court found that there was a probability of future violations by 321 Studios and a lack of adequate remedies at law for the movie studios. Therefore, the court issued an injunction preventing 321 Studios from "manufacturing, distributing, or otherwise trafficking" in any software that circumvents DVD encryption.¹⁰²

IV. IMPACT OF THE CASE

For 321 Studios, the result of this decision, combined with several other unfavorable decisions in other venues,¹⁰³ proved to be too much. In August 2004, the company shut down its operations permanently, unable to support its business after being enjoined from distributing its movie and video game copying software.¹⁰⁴ The company then settled a pending copyright infringement lawsuit with the movie studios by agreeing to cease distribution of its copying software and pay an undisclosed dollar amount.¹⁰⁵ Although this decision was the final chapter for 321 Studios, it will also impact other vendors, as well as consumers.

98. *321 Studios*, 307 F. Supp. 2d at 1103.

99. *Id.* at 1101-02.

100. *Id.*

101. *Id.* at 1104.

102. *Id.* at 1105.

103. See generally *Macrovision Corp. v. 321 Studios*, No. 04 Civ. 00080 (RO), 2004 U.S. Dist. LEXIS 8345 (S.D.N.Y. May 12, 2004); *Paramount Pictures Corp. v. 321 Studios*, No. 03-CV-8970 (RO), 2004 U.S. Dist. LEXIS 3306 (S.D.N.Y. Mar. 4, 2004).

104. Jim Suhr, *Maker of Software that Copies DVDs, Computer Games Folds*, SFGATE.COM (Aug. 3, 2004), available at <http://www.sfgate.com/cgi-bin/article.cgi%3Ff=/news/archive/2004/08/03/financial2106EDT0353.DTL>.

105. ECT News Entertainment Desk, *MCAA Settles Lawsuit Against 321 Studios*, E-COMMERCE TIMES (Aug. 11, 2004), at <http://www.ecommercetimes.com/story/35729.html>.

A. Vendors

There is an obvious market niche for the type of copying software that 321 Studios produced. Consumers of digital content clearly want to make copies of that content for a number of reasons, whether legitimate or not. With the closing of 321 Studios, it seems likely that another company will rise to fill its place. However, the decision in this case will make future distribution of copying software much more difficult, as *321 Studios*, *Corley*, and *Elcom* essentially bar the sale of this type of copying software.

One possibility for a new vendor to circumvent these decisions is to initiate lawsuits in a different forum. *321 Studios* and *Elcom* were both decided in the Northern District of California, and *Corley* was decided in the Second Circuit. If a new vendor of copying software were to sue for declaratory judgment of non-violation of the DMCA in another district, the court would not be bound by these precedents. Another court might find the arguments proffered by 321 Studios more convincing, and reach a different conclusion. On the other hand, it may find these non-binding precedents highly persuasive and follow the reasoning of the courts that have already examined the issues.

Another possible strategy for new vendors is to take advantage of DeCSS's widespread availability on the Internet and market a product that does not contain the circumvention code. The vendor could include code for the graphical user interface that allows users to easily perform the desired tasks and instructions for downloading DeCSS from the Internet and loading it into the program. In that situation, it would be more plausible for a vendor to argue that its software does not circumvent the access or copy control measures on DVDs. The software would be incapable of doing so on its own without alteration by the end user.

Finally, software such as DVD X Copy will undoubtedly remain available over the Internet through file-sharing programs and "warez" sites.¹⁰⁶ Although the court's order enjoins the software's creators from marketing it through legitimate channels, there will always be a flourishing market for illegal copies of the software on the Internet. Many such sites are in foreign countries and are therefore outside of the jurisdiction of the U.S. court system.

B. Consumers

The most significant impact of this decision on consumers is its effect on their ability to make fair use copies of legally purchased

106. The term "warez" denotes "[c]ommercial software that has been pirated and made available to the public via a BBS or the Internet. Typically, the pirate has figured out a way to de-activate the copy-protection or registration scheme used by the software." WEBOPEDIA, at <http://www.webopedia.com/TERM/w/warez.html> (last visited Aug. 10, 2004) (defining warez).

content. The right of the public to make use of copyrighted works for fair use purposes has long been recognized by Congress and the courts.¹⁰⁷ Although the courts that have examined the constitutionality of the DMCA have not denied that DVD purchasers have the right to make fair use of the content contained on the discs, the courts have not made it easy to do so.¹⁰⁸

As previously discussed, the *321 Studios* decision has made it difficult for a commercially viable model of distributing DVD copying software to exist. Consequently, it is more difficult for consumers to obtain the tools needed to make fair use copies of DVDs. The courts say that consumers can use alternate means for copying, such as copying from formats other than DVD. However, with the increasing dominance of the DVD format in the home video market, such alternative methods may not be available to consumers. The fact that the courts have interpreted the DMCA to prevent the distribution of DVD copying software means that movie distributors will rely more heavily on the DVD format as a means for distribution, thus making alternative sources of material for fair use even more difficult to find.

Not only does this interpretation of the DMCA hinder fair use of copyrighted works, it also restricts the use of works in the public domain. If a work in the public domain were released only on encoded DVD, the *321 Studios* decision would make it essentially impossible for consumers to make copies of that work without relying on illegally distributed software, even though it appears to be within the consumer's right to make the copy. In the absence of illegally distributed and foreign software, this result provides content providers with an indefinite monopoly on their works, a direct violation of the limited times requirement in the Intellectual Property Clause.

C. Future of the DMCA

Courts across the country have been rather consistent when evaluating the constitutionality of the DMCA. On the other hand, public outcry against the DMCA has been fairly prevalent, especially on the Internet.¹⁰⁹ Rather than turning to the courts for relief, opponents of this legislation are now turning to Congress. Lobbying groups, such as the

107. 17 U.S.C. § 107 (2003); *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841).

108. See generally *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085 (N.D. Cal. 2004); *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002).

109. See, e.g., *Petitiononline.com, Abolish the Digital Millennium Copyright Act Petition*, at <http://www.petitiononline.com/nixdmca/petition.html> (last visited Aug. 28, 2004); *The Anti-DMCA Web Site*, at <http://anti-dmca.org> (last visited Aug. 28, 2004); Adam C. Engst, *The Evil That Is the DMCA*, TIDBITS (Nov. 18, 2002), at <http://www.tidbits.com/database-cache/tbart06997.html>; Posting of Antichrist Pizza to Livejournal.com (July 21, 2001), at <http://www.livejournal.com/users/acpizza/23622.html>.

Electronic Frontier Foundation¹¹⁰ and Public Knowledge,¹¹¹ have become more prominent, and are working to counteract the influence of entertainment lobbying groups such as the MPAA. As a result of these groups' efforts, there is currently a bill before the House of Representatives that would overturn parts of the DMCA in order to preserve fair use rights for consumers.¹¹² Although this bill has not yet passed, its presentation and evident support indicate the increasing efficacy of organizations working to maintain a strong public domain and fair use rights.

V. CONCLUSION

In the end, the *321 Studios* decision allows end users the right to make copies of public domain works and fair use copies of protected works. However, the court forbade selling, distributing, or marketing the tools that make such copying possible. The reasoning behind this decision is dependent on the supposition that end users can make copies for fair use purposes from other sources. If the DVD completely supplants other formats, however, it may be necessary to take another look at this decision, and those preceding it, to determine whether the DMCA follows Congress's intention of preserving fair use rights. Until that day, or until Congress enacts further legislation on the subject, it seems as though consumers who want to make copies of DVDs will have to turn to less reputable sources for the means to do so.

110. Electronic Frontier Foundation, Homepage, at <http://www.eff.org> (last visited Aug. 29, 2004).

111. Public Knowledge, Homepage, at <http://www.publicknowledge.org> (last visited Aug. 29, 2004).

112. Michael Grebb, *DMCA Foes Find Allies in House*, WIRED (June 17, 2004), available at <http://www.wired.com/news/digiwood/0,1412,63876,00.html>. This bill, the Digital Media Consumers' Rights Act of 2003 (H.R. 107), was still being discussed in subcommittees at the end of 2004. See Bill Summary and Status for the 108th Congress, H.R. 107, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:h.r.00107>: (last visited Dec. 20, 2004).