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First Amendment Speech and the Digital Millennium Copyright Act: A Proper Marriage

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**FIRST AMENDMENT SPEECH AND THE DIGITAL MILLENNIUM
COPYRIGHT ACT: A PROPER MARRIAGE**

RAYMOND T NIMMER*

1 Introduction

During the past three decades, our world has experienced the greatest explosion in innovation and the dissemination of information ever seen. Not coincidentally, this period also involved an expansion of intellectual property and other rights in information.

Largely ignoring the connection between these two events, however, a group of academics and members of the public insistently campaign for narrowing property rights in information and retrenchment in areas of law such as copyright. The arguments take many forms, but have one thing in common – an insistence that the creation and enforcement of strong rights in information stifles rather than supports, innovation and information growth and will continue to do so unless checked by courts, legislatures, governmental agencies, or any other available source.

This argument has spilled onto many different issues, including the topic that is focus of this paper – the anti-circumvention rules of the Digital Millennium Copyright

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Act (DMCA).¹ These rules make it illegal to circumvent technology that restricts access to copyrighted works and, in some cases, to manufacture or traffic in technology or devices that enable such circumvention. Here, we ask ‘what is the relationship between these aspects of the DMCA and free speech?’

The answer involves two parts. Most obviously, the DMCA encourages and supports creative work and its dissemination. In most cases, the creation and dissemination of copyrighted works is speech. In this respect, then, the DMCA supports First Amendment norms. Indeed, its core purpose is to promote speech by enhancing options for speakers and supporting their choice of how to make their speech available to others. As shown below, the DMCA rules address a reality created by modern information technology that makes possible rapid copying and dissemination of perfect, unauthorized copies of creative works. That technology shifted the scales that once balanced copyright law. The DMCA seeks to restate the balance and to restore the incentives promoting innovation and creative works. The DMCA does not restrict the availability of creative works, but increases it.

Second, in some circumstances, the DMCA allows private or government action against conduct that might otherwise undermine the incentives historically employed in law to encourage creativity and published speech. It is here that some opponents of property rights (‘rights restrictors’)² focus, arguing that any control stifles speech.³ But

¹ 17 USC s 1201.

² See PM Schwartz & WM Treanor, ‘*Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*’, 112 Yale Law Journal 2331 (2003).

the argument misses the mark unless one accepts that the policy supported by the rights restrictors – lesser rights are better – should be enshrined as mandatory law. In fact, in most cases, DMCA-regulated conduct does not involve speech and, to the extent that it does, it properly focuses on conduct elements in a content neutral manner despite any incidental (minor) impact on speech.

This article proceeds in three parts. Section 2 briefly examines the complex relationship between law and innovation and then discusses what the DMCA actually provides. There has been an amazing amount of disinformation about the scope of the DMCA. However, on examination, Act is a relatively narrow statute that seeks to reinstate or enhance incentives that intellectual property law has long provided to encourage creative speech in a complex framework of influences on innovation. While a rights-restrictive argument assumes that each right granted to a copyright owner takes from the public, the truth is quite different and enhanced protections under the DMCA are likely to create an increase in both proprietary and public domain information. Section 3 then turns to First Amendment issues, underscoring that most of the conduct

³ The rights-restrictors' arguments constantly mutate. In effect, they support a policy in search of a means of implementation. Whether discussing copyright term extension, the DMCA, software protection, contract law, First Amendment, fair use, or any other issue, the premise remains constant. One writer commented that, in this view, in a conflict between copyright and any other social value, the 'other' value prevails. See JV Delong, 'Defending Intellectual Property,' in A Thierer and C Wayne Crews Jr (eds), *Copy Fights: The Future of Intellectual Property in the Information Age* (Washington DC: Cato Institute, 2002) 17, 19.

affected by the DMCA is not speech. To the extent that speech is adversely impacted by DMCA rules, the proper constitutional standard treats the DMCA as a content-neutral regulation that can be sustained unless it affects substantially more speech than is necessary to achieve the governmental objective. Section 4 demonstrates that DMCA meets that test.

2 DMCA and innovation policy

2.1 Innovation and law

Every society has an interest in promoting innovation and the dissemination of creative ideas, products, and technology. That societal interest has been heightened in recent years by the increasing emphasis in commerce and elsewhere on use and distribution of information.

Despite its importance socially, the exact way in which law interacts with private creativity and the availability of information for use in commerce and elsewhere is unclear.⁴ How law can support innovation and speech is a complex question that has become controversial. In modern history, however, one part of the overall approach has involved laws recognizing proprietary rights in innovative subject matter. These property rights have varied over the years as technology changes, but they reflect both the fact that the rights create incentives to create and disseminate, and the fact that the speaker has a

⁴ For one effort, see WM Landes & RA Posner, *The Economic Structure of Intellectual Property Law* (Cambridge: Harvard University Press, 2003).

right to control uses of its own creative product. Laws of this type also reinforce social norms that informational subject matter is, and has long been, an important, protected part of modern society.

Nevertheless, the rights restrictor viewpoint advocates a view that rights should not be increased and, ultimately, that existing rights have gone too far and should be curtailed to enable social development. This literature is sufficiently well published and I will not restate it here.⁵ However, there are two themes that bear on our subject.

The first is the observation that proprietary rights often result in transactions that place the rights in the hands of large corporations. These corporations, the argument goes, should not be broadly protected because they have assets, and should not obtain enhanced rights, such as those established under the DMCA.⁶ This view resonates in post-modern, populist, anti-big-business ideals. As a policy matter, there is little to be said for this view in a culture where commerce shapes parts of our lives and where the creative artist and speaker receives the benefit of the transactions and even large companies are fueled by small or individual creators. As a First Amendment matter, the argument has the even greater vice of seeking to lock in an untested and radical viewpoint that rejects markets and market behavior. Avoiding that lock-in is, in itself, a reason to approach the constitutional law aspect of the rights restrictors' arguments with skepticism.

⁵ For a list of articles, see Paul M. Schwartz & William Michael Treanor, '*Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*', 112 Yale Law Journal 2331 (2003).

⁶ For example, NW Netanel, '*Locating Copyright Within the First Amendment Skein*', 54 Stanford Law Review 1, 34-35 (2001).

The second theme begins with the banal observation that creative works build on prior work of others. The political argument against property rights builds on this observation with a flawed syllogism: creative work depends on the work of others that is freely available for use; the creation of rights reduces what information is freely available; and, therefore, expansion of rights impedes the development of new creativity.⁷ The syllogism assumes that publicly available (public domain) and privately owned (proprietary) information form a closed system - each increase in private control takes from the public, while each movement toward the public takes from the private. The assumption is grossly incomplete.

The relationship between law and the production and distribution of creative works and information is a dynamic one, in which inputs and out-puts are induced by a complex variety of factors. Some inputs will not occur unless an incentive and economic base exists for private parties to make and distribute new works; this incentive depends sometimes on whether an effective method exists to prevent others from copying and altering copies of the works. A not-produced and never-distributed work contributes to neither the public nor the private domain. More important, not all information in a proprietary work can be controlled by the rights owner. New *proprietary* works contribute to *both* the wealth of proprietary (controlled) information and to information in the public domain.⁸ This is not a zero sum game. Similarly, on the other side, information

⁷ See Y Benkler, 'Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain,' 74 New York University Law Review 354 (1999).

⁸ See RP Wagner, 'Information Wants to be Free: Intellectual Property and the Mythologies of Control', 103 Columbia Law Review 995 (2003).

continuously passes out of use and into unavailability for most purposes. It does so for numerous reasons, one of which is over-use, another is simple lack of interest by any appreciable group of potential users.

Within this complex system, governmental action to preserve previously effective incentives is neither irrational nor clearly wrong. It is a reasonable approach to an important issue. That is what is attempted in DMCA.

2.2 *What does the DMCA actually do?*

Our focus here is on free speech aspects of the DMCA. To deal with that issue, we need to understand the statute.

The DMCA proscribes three types of conduct. The core provision makes it illegal to circumvent a technological device that controls access to a copyrighted work.⁹ There are several exceptions protecting among other things, academic research and reverse engineering in some cases.¹⁰

This circumvention rule focuses on *conduct* (circumventing a technological device). It applies only to copies of a work that the rights owner has chosen to distribute in access-protected form. It thus lends legal support to a speaker's option that has always existed. No law requires distribution of speech or distribution of copies in a form that can be readily recopied in digital form. By supporting the speaker's options, the DMCA

⁹ 17 USC s 1201(a).

¹⁰ 17 USC s 1201(d)-(h).

increases his or her incentive to speak by increasing her ability to choose how to distribute the work and also reinforces social norms protecting intellectual property. The existence of alternatives encourages speech.¹¹ If a potential speaker is limited to two choices: (1) not disseminate at all, or (2) disseminate with no effective limits on copying or modification of copies, the willingness to create and to distribute information will be less than if he or she were not so limited. Some of us all the time, and all of us some of the time, create, speak and distribute information without charge or limitation. But there are many situations where speech will not occur unless control and potential rewards exist. It is in such cases that access controls operate. Whether anyone will acquire or listen to speech in the form the speaker chooses is best left to the marketplace.

The First Amendment and other civil liberties protect personal autonomy and choice. A balance needs to be struck, however, between the speaker and those who use his or her speech for their own purposes. Digital systems altered the balance in copyright law in a manner adverse to the author by allowing no cost, widespread, immediate and perfect copying. Protecting access technology may reset the balance.

However, the DMCA does not give the rights owner control over all uses of his speech. For example, assume that an author distributes a digital book under technology that precludes some access and copying. The restriction limits how the user can access the information. Yet, the book would not be distributed in this form unless others are willing to acquire it because under some conditions they can read or use the text. The

¹¹ RT Nimmer, 'Licensing in the Contemporary Information Economy,' 8 Washington University Journal of Law and Policy 99 (2002).

protected restraint focuses only on limited uses. A person is not precluded from using the information learned, from discussing it, or from criticizing or lauding it.

In any case, where the speaker would not create or distribute copies if they can be copied or modified, the DMCA produces an increase in both the overall amount of available proprietary information and public domain information. The increase to the public domain lies in the many uses of the information that neither the DMCA nor copyright law preclude.

The second and third types of conduct regulated by DMCA involve trafficking in technology or devices that circumvent technology that controls access to a work or that enforces rights under copyright law. Some argue that broad control over disseminating such technology may improperly stifle speech, but the Act is not broad and the narrowing features of it are important. The rules on access device trafficking state:¹²

- 1) no person shall *manufacture, import, offer to the public, provide, or otherwise traffic* in;
- 2) a *technology, product, service, device*, component, or part thereof, that
- 3) is *primarily designed* or produced for the purpose of circumventing, has *only limited* commercially significant purpose or use other than to circumvent, or *is marketed* ... for use in circumventing,
- 4) a technological measure that effectively controls access to a work protected under this title.

¹² 17 USC s 1201(a).

Factual issues relating to the reasons why a person created or distributed a device will arise in applying these rules. However, such distinctions are the essence of First Amendment jurisprudence.

Because the first three elements contain subparts, the statute is complex and may seem to cover more than it does. Yet, the statutory language limits the trafficking rules to manufacturing or trafficking in a ‘technology, product, service, device [or] component,’ and only if that occurs under stated limited conditions. This concerns products and technologies distributed for the purpose of use in achieving circumvention, not for purpose of academic or other research, nor for purposes of public debate.

3 First Amendment issues

3.1 First Amendment issues generally

In a world in which technology enables immediate and perfect copies of speech to be made and distributed, protecting exclusive rights in digital information in fact requires a focus not only on copying or other infringement, but also on the means to make, modify and distribute copies. Speakers and authors of information have an interest in being able to place limited fences around their works to protect their rights and to shape how their speech is communicated to, or withheld from, others if they so choose. But how does this square with rules protecting free speech?

U.S. First Amendment law engages a variety of balancing tests and themes that constrain regulation of speech in favor of preserving robust political, educational, and

similar speech, but that also balance the scope of protection with other important social interests. The closer a regulation reaches in affecting the content of public discourse, the more likely that the regulation will be subject to close, often invalidating scrutiny. The further removed the law is from that type of impact, the more likely it is to receive validating scrutiny.

The themes of protected speech and of permitted regulation are both central to free speech law. When applied to the DMCA, it becomes clear that the statute is consistent with First Amendment norms and that some of the abuses that some believe might arise under the DMCA would not be sustainable under *either* the DMCA or the First Amendment.

Copyright and the First Amendment have long co-existed even though copyright law restricts what parties can and cannot do with information created by other speakers.¹³ That long-term relationship recognizes that rights under copyright law enhance and encourage creative speech, while the restrictions copyright places on the ability of others to express their own ideas are relatively minor restrictions on form as contrasted to ideas. The issue is whether DMCA, which deals with copyrighted works in a manner different from traditional copyright law, wrongfully impinges on protected First Amendment interests. It does not.

3.2 *Is the subject matter protected speech?*

¹³ *Eldred v Ashcroft*, 537 US 186 (2003).

First Amendment doctrine balances governmental power and the restraints on that power that preserve fundamental speech rights. One issue that underlies all of this is whether or not a particular law or regulation restricts speech at all. That is where we must begin in discussing the DMCA.

The DMCA enhances options available for speakers and supports their choice of how to make their speech available to others. To do so, it creates rights to prevent circumvention and trafficking in circumvention technology. Some of that regulated conduct involves speech, but most of it does not.

3.2.1 Speech and actor's purpose

Speech is *expressive* behaviour. In most cases, the expressive component comes in words, sounds, or images. In other cases, speech entails conduct, such as dance, miming, or burning a flag. Speech is behaviour that intends to communicate ideas, emotions or other content to other persons. This requires that the actor use symbols, sounds or conduct with the intent to communicate to humans.

Especially for conduct not ordinarily associated with expressive behaviour, courts have struggled to establish the appropriate standards to determine whether speech, rather than mere conduct, is present and whether a particular law regulates speech as compared to conduct. There is general agreement, however, that whether the communicative intent required is present depends on the circumstances in which the conduct occurs and the purposes of the actor. A person that takes an axe to a log in the forest to obtain firewood is engaged in functional (non-speech) behaviour (chopping wood), while a person that uses an axe to cut a piece of wood during a stage play on the beauty of physical labor

may well be engaged in speech, especially if there is a stylized or emotive aspect attached to the activity. The same conduct can be speech in one context and non-speech in another. Burning a flag may be speech if done as part of a political demonstration, or it may be mere conduct if done solely to dispose of a tattered item.

The leading case on the distinction between speech and conduct in the United States is *United States v O'Brien*.¹⁴ In *O'Brien*, the defendant destroyed a selective service card as a symbolic act of protest. The court rejected the argument that punishment for this conduct offended the First Amendment:

We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even [if] the alleged communicative element in O'Brien's conduct [brings] into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. [When] 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms.¹⁵

¹⁴ *United States v O'Brien*, 391 US 367 (1968).

¹⁵ *ibid* 376.

Not all conduct is speech, even if the actor has a point to make. Conduct with some speech element in it can be regulated pursuant to important governmental goals, even if an incidental impact on speech occurs.

3.2.2 Actual circumvention as conduct

Is actual circumvention of technology speech?

In most cases the answer is no. Circumventing a technological control is a functional act with a functional goal - to obtain access to, or use of, a work by defeating the control technology. That conduct typically entails no expressive purpose or intent. The actor does not intend to express ideas to others by the conduct, but rather to achieve a functional result. Like the axe-wielding person in the forest, the person that circumvents an access control device is not by that conduct automatically engaging in expressive activity. There is typically no communicative intent in the conduct.

The nature of the conduct does not change simply because the person engaged in the circumvention does so with the intent of using the information accessed to create the person's own speech. That ultimate use of the information may or may not be speech. For example, merely making a back-up copy is not constitutionally protected speech. Even so, DMCA does not regulate *uses* of works, leaving that to other law. Indeed, DMCA specifically disavows any intent to alter fair use or to change rights under copyright law.¹⁶ Under copyright law, some copying of a protected work constitutes fair use, while some uses do not engage copyright law at all, but other uses are infringement. DMCA

¹⁶ 17 USC s 1201(c)(1).

does not change that calculus. It regulates only the act of circumvention or trafficking in circumvention devices.

In some circumstances, the First Amendment creates a right of access in order to allow speech to occur. Most such cases, however, focus on access to physical places or to governmental information, public hearings, trials or the like. But these are not DMCA issues. The First Amendment does not create a right of access to information held by a private party simply because the accessing person desires to copy or use the information for its own purpose. Interests in personal autonomy, property rights, and a simple right not to speak, foreclose such claims. Indeed, the right not to speak or to do so anonymously is well established.¹⁷

As discussed later, some have argued that the circumvention rules preclude speech because they limit access for fair use of a work. As a constitutional issue, that argument fails. More important, since DMCA encourages distribution of digital works, it actually increases access. DMCA limitations focus only on devices that control limited types of use of a *copy*. The information on the copy is available, unless one visualizes, for example, a motion picture distributed under a technology that precludes *all* access at *all* times by *all* persons - an improbable image.

3.2.3 Trafficking: computer programs as speech

In addition to actual circumvention, DMCA regulates some manufacturing, trafficking in, or distribution of circumvention *technology* or *devices*.¹⁸ In practice, this will most often

¹⁷ *Tattered Cover, Inc v City of Thornton* 44 P3d 1044 (Colorado Supreme Court, 2002).

¹⁸ 17 USC s 1201(b).

entail computer programs or devices containing them. Thus, the regulated conduct is manufacturing, trafficking in or distributing certain computer programs or devices containing them. We thus need to ask whether (or when) dissemination of computer code is speech before asking whether DMCA rules affecting this conduct are permissible under a First Amendment analysis.

Dissemination of computer programs can occur in many ways and for many different purposes, not all of which qualify as speech, but some of which may. Compare, for example, a public reading of source code to an audience of programmers and the use of code to operate a machine. The reading resonates in speech, but use in the machine by the owner does not if the use is not communicative in nature.

Most courts facing the issue hold that distribution of programs *can be* speech even if the code is in machine form for direct use in a computer. Deciding whether particular conduct constitutes speech requires asking why the alleged speaker engaged in the conduct. The issue can be illustrated by comparing two decisions of the Court of Appeals of the Second Circuit.

In *Commodity Futures Trading Commission v Vartuli*,¹⁹ the court held that software (called ‘Recurrence’) as marketed could be subject to rules requiring prior registration of commodities advisors. The program instructed clients when to trade commodities futures. Arguably, registration could not be required of parties engaged in pure speech, but the software *as marketed* was not exempt because it was to be used in an entirely mechanical way - the user was simply to follow instructions to trade or not trade:

¹⁹ *Commodity Futures Trading Commission v Vartuli* 228 F3d 94 (US Ct of Apps (2nd Cir), 2000).

‘In other words, the fact that the system used words as triggers and a human being as a conduit, rather than programming commands as triggers and semiconductors as a conduit, appears to us to be irrelevant for purposes of this analysis.’²⁰

This is questionable jurisprudence, but *Vartuli* underscores that method and intent matter in distinguishing speech from mere conduct. One year later, *Universal City Studios, Inc v Corley* came closer to getting the analysis right.²¹ *Corley* involved a DMCA injunction against the distribution of circumvention code. The court held that the injunction was enforceable, but that distributing computer code in this case was speech. It is the conveying of information to humans that makes distribution of computer programs ‘speech’. The court observed:

[Programmers] communicating ideas to one another almost inevitably communicate in code ... Limiting First Amendment protection of programmers to descriptions of computer code (but not the code itself) would impede discourse among computer scholars ... Instructions that communicate information comprehensible to a human qualify as speech whether the instructions are designed for execution by a computer or a human (or both). ... *Vartuli* considered two ways in which a programmer might be said to communicate through code: to the user of the program (not necessarily protected) and to the computer (never protected). ... Since *Vartuli* limited its constitutional scrutiny to the code ‘as marketed,’ *i.e.*, as

²⁰ *ibid* 111-112.

²¹ *Universal City Studios, Inc v Corley* 273 F3d 429 (US Ct of Apps (2nd Cir), 2001).

an automatic trading system, it did not have occasion to consider a third manner in which a programmer might communicate through code: to another programmer.²²

Code can communicate to humans for purposes of free speech analysis in many different ways. *Corley* reflects the view of other courts that have considered the issue. Computer code can receive First Amendment protection depending on the purpose in distributing it.²³

3.3 *Content neutrality, function and regulation*

As we have seen, while much of the conduct affected by DMCA is not speech, some of it may be speech. Even as to affected speech, however, the First Amendment does not necessarily bar regulation. The governmental purpose, the actor's intent, and the nature of the speech all shape the First Amendment analysis.

3.3.1 Content neutrality

If a regulation affects speech, the most significant issue in determining how free speech concepts apply is whether the regulation is content-based or content-neutral.

A content-based regulation is one in which the government takes sides in a political, social or similar discussion by discriminating based on the *content* of a

²² *ibid* 446.

²³ See *Junger v Daley* 209 F3d 481 (US Ct of Apps (6th Cir), 2000).

speaker's viewpoint.²⁴ This sides-taking touches the core of the First Amendment. The goal of free speech is to ensure an open marketplace of ideas and speech free of governmental control. Content-based regulations are suspect under US law and invoke what is described as 'strict scrutiny' by courts. This often invalidates the law because validity under strict scrutiny not only requires that there be a strong policy supporting the regulation, but also that the means used to achieve the policy is the least restrictive of speech. In effect, the court closely reviews both the purpose of the law and its method.

Content-neutral laws receive far less scrutiny because they do not place the government in support of, or in opposition to, a particular viewpoint in a public discussion. As one court noted: '[if the regulation] does not involve government censorship of the subject matter or governmental favoritism among different viewpoints, it is content neutral and not subject to strict scrutiny'.²⁵ Content-neutral regulation is permitted if it serves a substantial governmental interest unrelated to the suppression of speech and is tailored so as to not burden substantially more speech than is necessary to further that interest.²⁶

²⁴ See NW Netanel, 'Locating Copyright Within the First Amendment Skein', 54 Stanford Law Review 1, 34-35 (2001) ('First Amendment jurisprudence posits that, at least when exercising its regulatory power, government ought to serve as a neutral umpire in citizens' public discourse.').

²⁵ *DVD Copy Control Association, Inc. v Bunner* 75 P3d 1 (California Supreme Court, 2003).

²⁶ *Universal City Studios, Inc v Corley* 273 F3d 429 (US Ct of Apps (2nd Cir), 2001); *Turner Broadcasting System Inc v FCC* 5123 US 622, 662 (1994).

The question thus becomes whether, to the extent it regulates speech, DMCA is content-based or content-neutral. The primary factor defining content neutrality is whether the government adopted the regulation without reference to the viewpoint expressed. The government's purpose is the controlling consideration. A regulation is content-based only if the government adopted it 'because of disagreement with [or support for] the message [the speech] conveys'.²⁷ A regulation that serves purposes unrelated to suppressing viewpoints is neutral even if it has an incidental effect on some speakers or messages but not others.²⁸

Content neutrality, thus, does not mean that no subject matter is singled out, but that regulations operate without reference to the viewpoint expressed. In practice, many cases centre on place, manner and time regulations, but content neutrality also applies to regulations focusing on conduct even if the conduct has a speech component, so long as the regulatory controls focus on the functional or conduct aspects.²⁹

The DMCA is content-neutral. Its restrictions on speech are incidental to the statute's primary purpose. The governmental purpose is not to restrict discussion of encryption technology or of any particular viewpoint or approach as compared to others. Its purpose is to protect copyrighted works in order to promote dissemination of speech and the development of creative works. Copyright law creates a property right and a goal

²⁷ *Ward v Rock Against Racism* 491 US 781, 791 (1989). See also *Hill v Colorado* 530 US 703, 720 (2000).

²⁸ *Turner Broadcasting System, Inc v FCC* 512 US 622 (1994).

²⁹ See NW Netanel, 'Locating Copyright Within the First Amendment Skein' 54 *Stanford Law Review* 1, 34-35 (2001).

of the DMCA is to protect that property, a goal both significant and content-neutral. The goal is not to protect works containing one type of content while leaving other content unprotected, nor is the statute applicable to one type of circumvention technology and not others.

The Act does focus on particular types of technology, but that does not characterize it as content-based. The California Supreme Court in *DVD Copy Control Association, Inc v Bunner*,³⁰ for example, affirmed an injunction under trade secret law against posting decryption code on the Internet, holding that the injunction was content neutral even though it referred to *distribution of a particular technology with particular content*. It was content-neutral because the purpose of the injunction was to protect a property right (the trade secret), rather than to suppress speech based on viewpoint. The court's analysis provides insights applicable to DMCA:

[The] injunction's restrictions on Bunner's speech 'properly are characterized as incidental to the primary' purpose of California's trade secret law -- which is to promote and reward innovation and technological development and maintain commercial ethics. ... [The] specific deprivation to be remedied is the misappropriation of a property interest in *information*. Thus, any injunction remedying this deprivation must refer to the content of that information in order to identify the property interest to be protected. ... Because the preliminary injunction at issue here does not

³⁰ *DVD Copy Control Association, Inc v Bunner*, 75 P3d 1 (California Supreme Court, 2003).

‘involve government censorship of subject matter or governmental favoritism among different viewpoints’, it is content neutral and not subject to strict scrutiny.³¹

Content neutrality does not preclude identifying the informational subject matter addressed. To be content-neutral is to not take a position by hindering or helping expression of a viewpoint in the debate itself.³²

3.3.2 Character of the speech

In addition to content neutrality, courts look to the nature of the affected speech itself and the extent to which regulation of that speech implicates core First Amendment values.

Not all expressive conduct is treated equally. Indeed, some expression is outside all First Amendment protection, such as obscenity and words intertwined in unlawful conduct. Thus, threats made with an immediate likelihood of being carried out are criminal, while a criminal conspiracy is not protected simply because it is made by use of words. Distribution of a computer virus with the intent to harm is criminal conduct, even if computer code may constitute speech in some cases. Some conduct affected by the DMCA, even if expressive, may fall within this type of exclusion from First Amendment protection.

³¹ *ibid* 878-879.

³² See NW Netanel, ‘Locating Copyright Within the First Amendment Skein,’ 54 *Stanford Law Review* 1, 34-35 (2001).

Other types of expressive activity are recognized as speech, but receive less protection than political and artistic speech because of the subject matter. ‘Commercial speech’ is an illustration; commercial advertising receives less protection than political speech.³³ The explanation lies in the public interest in preventing misleading, fraudulent or otherwise harmful *commercial* messages, and in the fact that commercial speech does not entail the political, cultural or other substantive discourse that First Amendment protections primarily address. A commercial broadcast to tout a new beer is not intended to engage a public policy debate about alcohol, but to sell a product. While not evil, that intent does not receive the same protection as an anti-war speech because the latter lies more within the core of First Amendment concerns and because the commercial motivations for advertising may render it more resilient to regulation.

In general, courts often recognize distinctions among types of speech by imposing less stringent limitations on governmental action in cases involving what might be viewed as speech that lies less close to the core of First Amendment protection. This is relevant to the DMCA and points toward lesser constitutional restriction for a law focused on the use, manufacture and distribution of technology or devices. The Second

³³ For example, *Central Hudson Gas & Elec Corp v Public Serv Comm’n* 447 US 557 (1980). What is meant by ‘commercial speech’ is under reconsideration in a manner that may affect our topic. See, eg, *Kasky v Nike, Inc.* 45 P3d 243 (California Supreme Court, 2003) (on a 4 - 3 vote, the court held that public relations campaign by corporation with respect to labor practices was commercial speech), cert. gr. 537 US 1099 (2003) and cert. dismiss as improvidently granted, 539 US 654 (2003) (three Justices dissent from dismissal with a written opinion).

Circuit in *Corley*, for example, emphasized the functional nature of computer code in affirming a DMCA injunction. The comments of the California Supreme Court in *DVD Copy Control Association, Inc v Bunner*³⁴ are also relevant. The court upheld an injunction against Internet posting of DeCSS decryption code. The defendant had argued that his disclosure of the code was part of a debate on issues of public interest. Rejecting this argument, the court observed:

[The] content of the trade secrets neither involves a matter of public concern nor implicates the core purpose of the First Amendment. ...

[Plaintiff's] trade secrets in the CSS technology ... convey *only* technical information about the method used by specific private entities to protect their intellectual property. Bunner posted these secrets ... on the Internet so Linux users could enjoy and use DVDs and so others could improve the functional capabilities of DeCSS. He did not post them to comment on any public issue or to participate in any public debate. ... Thus, these trade secrets ... address matters of purely private concern and not matters of public importance. ... Disclosure of this highly technical information adds nothing to the public debate over the use of encryption software or the DVD industry's efforts to limit unauthorized copying of movies on DVD's. And the injunction does not hamper Bunner's ability to 'discuss and debate' these issues...³⁵

³⁴ *DVD Copy Control Ass'n, Inc v Bunner* 75 P3d 1 (California Supreme Court, 2003).

³⁵ *ibid* 15-16, 884-885.

The court differentiates between function and public debate. The distinction is based on the intent of the party and the nature of the material distributed. The functionality of computer code affects the scope of its protection.

4 Standards applied

4.1 Permitted content-neutral regulation

DMCA in most cases regulates pure conduct. Even if the affected conduct is arguably communicative, however, DMCA is content neutral regulation of speech that is often primarily functional in purpose. In First Amendment parlance, content-neutral regulation receives an ‘intermediate’ level of scrutiny.³⁶ The DMCA passes that scrutiny.

A content-neutral law must: 1) serve a substantial governmental interest, 2) the interest must be unrelated to suppressing free expression, and 3) the restriction must not burden substantially more speech than is necessary to further that interest.³⁷ Content-neutral regulations are not invalid simply because they affect speech. The regulation is invalid only if it has adverse impact on substantially more speech than necessary to achieve its goals.

³⁶ ‘Intermediate’ in the sense that it falls between the strict scrutiny of content-based regulation and the largely unlimited regulation of non-speech conduct or expression that falls outside the First Amendment – eg, obscenity.

³⁷ *Turner Broadcasting System, Inc v FCC* 512 US 622 (1994).

There is no doubt that the DMCA deals with a substantial governmental interest – promoting the creation and distribution of creative speech. It does so by protecting use of technology that allows access-protected copies of works to be distributed, reinforcing incentives for innovation, and supporting decisions of persons engaged in distributing or creating speech to do so under technological limitations. These are pro-speech objectives. None entails a desire to suppress speech. Any one of these objectives suffices as the substantial state interest that supports content-neutral regulation. Taken together, they more than suffice.

That brings us to the question of whether DMCA affects substantially more speech than necessary to further the governmental interest involved. The DMCA has received an unusually large amount of distorted commentary unrelated to the actual language of the statute. The result is a politically-contrived caricature of the DMCA, creating unwarranted fears. The proper place to turn is the statutory language. Do the actual provisions have an impact upon First Amendment speech and is that impact substantially more than necessary to achieve the governmental goals involved?

We begin with the reality that most conduct affected by the DMCA does not involve speech at all. This does not mean that all applications of the DMCA are immune from challenge, but it does suggest that the statute is largely pro-speech from a First Amendment vantage – it targets non-speech conduct in order to promote speech.

4.2 *Actual circumvention and fair use*

With some exceptions, DMCA makes it illegal to circumvent an access control technology used in a copy of a copyrighted work. But actually circumventing a technology is most often not speech. It is conduct with a functional goal. That is true even if the goal is to undermine the use of the technology because the actor opposes it politically.

Some have argued that the DMCA forecloses the right of ‘fair use’ under copyright law. But is fair use a right? While the argument that fair use is a right has been popular among rights-restrictors seeking to narrow copyright, no court has ever held that fair use is a *right* that cannot be altered or conveyed away. Fair use doctrine lies in equitable, not constitutional considerations. But even if we characterized fair use as a right, that does not elevate that right to a constitutional mandate. Clearly, fair use is part of a package of copyright jurisprudence as a matter of policy. It is difficult, however, to find a basis to argue for a constitutional right with respect to many types of ‘fair use’ such as making a copy or giving a copy to a friend. The statute allows this in some cases, but this is not a constitutionally protected interest. The fact that a DMCA restraint may prevent the convenience of making a digital back-up copy does not over-ride the important interests enhanced by DMCA protections as a constitutional matter.

Even if all ‘fair use’ is a constitutional right, DMCA does not preclude fair use. It does not address partial copying, commentary or other conduct ordinarily associated with fair use. DMCA rules apply only if the distributor elects to use access controls and the purchaser acquired a copy subject to those controls. Yet, fair use jurisprudence ordinarily deals with cases in which a copy has been made available under terms that do not restrict use. The rights-restrictors’ argument is, in fact, that there should be a right to copy (or

modify) works *in digital form* regardless of the terms under which the copies were distributed. *Corley* rejected that policy argument, as did Congress and the U.S. Copyright Office:

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. ... DMCA does not impose even an arguable limitation on the opportunity to make a variety of traditional fair uses of DVD movies, such as commenting on their content, quoting excerpts from their screenplays, and even recording portions of the video images and sounds on film or tape by pointing a camera ... at a monitor as it displays the DVD movie. The fact that the resulting copy will not be as perfect or as manipulable 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.³⁸

Technology may limit access to digital copies and preclude copying or modification in digital form, but this does not preclude other uses or means of excerpting or commenting. Fair use is not a right to take material in digital form merely because that is convenient.

³⁸ [Ref]

There is no basis to argue that the DMCA enacts an across the board preclusion of fair use. To the contrary, it expressly preserves it. Indeed, it is likely that, by operation of the market or of courts reviewing cases of harmless conduct, even more flexibility will exist. But access in order to copy, alter, transmit or display works in digital, as compared to other forms, is not a First Amendment right. Convenience is not a protected interest unless the inconvenient becomes the impossible. Even then, a speaker's right not to speak may outweigh any alleged right of the user to access, recreate or modify the copy of it.

4.3 Trafficking rules and the First Amendment

Trafficking in circumvention technology or devices may, in some cases, involve speech. But the scope of DMCA here is narrow. DMCA applies only to manufacture or distribution of 'technology' or 'devices' that 'circumvent' controls used in copyrighted works. This focuses on devices and technology and affects the expressive only indirectly (if at all). The language does not apply to academic or political discussion of circumvention as a policy or to a discussion of the methods involved.

In addition, DMCA trafficking rules set out three limiting conditions that narrow the scope of the Act. Conduct is not covered unless it meets one of these conditions.

4.3.1 Designed primarily for circumvention

Under the first condition, manufacture, importation, or other trafficking in a technology or device is not within DMCA unless the technology or device was designed or produced *primarily* to circumvent a control system.

As we have seen, speech protection often turns on the purpose of the actor. This first condition focuses on circumvention technology designed or produced with a functional purpose as its primary goal. The primary purpose test clearly delineates between conduct and expressive purpose. It excludes cases where speech is the primary or coequal purpose, covering only cases where speech elements are incidental to a primary purpose of circumventing access control technology. Manufacturing or distribution with a primary goal other than to circumvent does not violate DMCA. For example, distribution of academic research, even if it contains code with a capacity to circumvent, is outside the scope because the research and its result were not done with the primary purpose of circumventing a technology. The purpose was research and intellectual advancement.

More difficult cases might arise if the violation involves a person that trafficks in a device or technology that was designed or produced primarily for the purpose of circumvention, but does so with a purpose other than circumvention in mind. If that other purpose is not speech, no conflict arises. For example, a person who ‘offers to the public’ a ‘product’ primarily designed for circumvention is not engaged in a protected act. Neither is a person who distributes such a device to further his political goal of undermining circumvention technology. In some few cases, however, the trafficking will entail protected speech. In those cases, a balancing issue may arise. One cannot predict specific cases, but application of the DMCA regulation will often prevail as incidental regulation of speech essential to the achievement of the statutory goals. As courts that have reviewed the DMCA have commented, enforcement of restraints against Internet

distribution of circumvention technology is the only means of implementing the statutory goals because of the immediate broad availability that Internet distribution creates.³⁹

4.3.2 Limited other purpose

The second condition brings manufacturing, importation, offering to the public, providing, and otherwise trafficking in a circumvention technology or device within DMCA, if the technology or device ‘has only limited commercially significant purpose or use *other than to circumvent*’ a control system.

This rule adapts doctrine associated with contributory copyright infringement. Under that copyright doctrine, a manufacturer or distributor of a product can be held liable for another person’s use of the product to infringe only if the product has no substantial non-infringing use. That rule was announced in the *Sony* case, a case grounded in concepts of fair use, rather than free speech.⁴⁰ Under it, for example, the manufacturer of a photocopy machine is not liable for contributory infringement if machines that it sells are used by third parties to infringe - the machines have substantial non-infringing uses. The contributory infringement doctrine has never been seriously challenged under the First Amendment because it deals with products (not speech) and because it achieves important goals while having little impact upon protected speech. The DMCA’s trafficking rules yield a similar result. The statutory language changes the test, but leaves the policy intact. Distribution of technology or devices whose only realistic purpose is circumvention is precluded, but distribution of technology is not, even though

³⁹ *Universal City Studios, Inc v Corley* 273 F3d 429 (US Ct of Apps (2nd Cir), 2001).

⁴⁰ *Sony Corp of America v Universal City Studios, Inc* 464 US 417 (1984).

the technology or product may in fact be used to circumvent. In effect, the lack of other significant uses indicates that enabling circumvention is the primary purpose.

The statute refers to ‘commercially significant purpose.’ The word ‘commercial’ creates some uncertainty. Does this require a profit-making purpose? One view is that this condition applies only if the manufacture or distribution had a profit-making purpose to begin with and asks whether there are significant purposes other than circumvention. The better alternative treats the reference to ‘commercial’ purposes as not being limited to money-making activity.⁴¹ Of the two,⁴² this better fits the statute since the three conditions refer to the general list of acts that are not limited to commercial activities. It sensibly creates a rule that asks whether the distributed (or manufactured) technology or device has significant other uses, creating a parallel to the rule in condition one but focused on other objective evidence of intent.

Under either view, condition two focuses on conduct that has a primary impact to provide circumvention. While in some cases there may be speech-related purposes involved, impact on that speech is incidental to the statutory purpose of precluding dissemination of devices to defeat circumvention technology in situations where the

⁴¹ See *A&M Records, Inc v Napster, Inc* 239 F3d 1004 (US Ct of Apps (9th Cir), 2001) (posting works for exchange among private parties is commercial use).

⁴² A third possibility is that the condition brings in all circumvention technology and devices, but excludes only those with a significant, non-circumvention, profit-making use. That would largely abrogate the other terms of the statute for all non-commercial technology, creating a result that under normal statutory interpretation rules should be avoided. That can hardly have been the intent.

primary purpose of the technology, or its only significant commercial use (however interpreted), is circumvention of technology protecting copyrighted works.

4.3.3 Marketed for circumvention

The third condition brings manufacture or distribution of a technology or device within the DMCA only if it is ‘marketed by that person’ for use in circumventing a control system.

The focus is on cases in which the actor distributes the technology or device with the intent that it be used to circumvent. This brings into DMCA only those cases where the actor’s purpose involves marketing the device for use in circumvention. By its terms, it does not apply to any distribution for academic analysis, artistic interest, or other non-circumvention use. It applies if the purpose for which it is marketed includes circumvention – a prohibited act.

4 Conclusion

The relationship between law and innovation is complex and its balance has been altered by digital systems for copying and disseminating information. Protecting the use of circumvention technology is a rational response to reinstating or maintaining the incentives to create and disseminate copyrighted works. The DMCA does that in a focused manner, the impact of which expands the wealth of both proprietary and public domain information.

The creation and dissemination of copyrighted works is typically speech activity. Thus, the core purpose of the DMCA is pro-speech. As content-neutral regulation, the constitutional test of validity for DMCA is whether substantially more speech is regulated than is necessary to achieve the governmental purpose. In fact, as we have seen, most of the conduct affected by DMCA is not speech.

Given the DMCA goal of protecting property rights and encouraging creative speech by protecting measures that control access, it is difficult to conceive of an effective alternative with a lesser impact on speech. In a world where the tools are digital and can be distributed universally in moments, dealing with both circumvention and distribution of circumvention technology or devices is important. The relationship between this approach and its intended effect was recognized in *Bunner*. The court there stated: ‘The First Amendment does not prohibit courts from incidentally enjoining speech in order to protect a legitimate property right. ... *Bunner* proffers, and we can think of, no less restrictive way of protecting an owner's constitutionally recognized property interest in its trade secrets.’ The *Corley* court also noted the connection:

Although the prohibition on posting prevents the Appellants from conveying to others the speech component of DeCSS, the Appellants have not suggested, much less shown, any technique for barring them from making this instantaneous worldwide distribution of a decryption code that makes a lesser restriction on the code's speech component. [A] content-neutral regulation need not employ the least restrictive means of accomplishing the governmental objective. It need only avoid burdening

‘substantially more speech than is necessary to further the government's legitimate interests’.⁴³

It has been possible for opponents to hypothesize extreme applications of the statute to bar all speech about encryption, all academic research on the issue, or to preclude ordinary uses of digital works by the persons to whom they are provided, but hypotheticals such as these require strained and problematic readings of the statutory language and ignore both the commercial context and the First Amendment jurisprudence that would prevent such applications if attempted and would lead to interpretations that follow congressional purpose and protect actual speech. Stating that such risks exists is an interesting form of advocacy, but the actual risk of actual occurrence of such hypotheticals is not demonstrated by threats that are withdrawn or by legal actions that fail. Ultimately, the focus of the statute is clear and quite narrow. If grey areas exist, courts are charged with interpreting a statute to effectuate its purpose within proper constitutional limits.

Overall then, in the DMCA we have an effort to reinforce incentives for the creation and dissemination of creative works. While some might desire a policy that moves in the opposite direction and weakens incentives, the approach in DMCA is more likely to achieve the goal of enhancing diversity, quality and quantity of distributed speech in society.

⁴³ *Universal City Studios, Inc v Corley* 273 F3d 429 (US Ct of Apps (2nd Cir), 2001).