

# The Great Kaleidescape: New Hope in the Digital Rights Debate

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## I. INTRODUCTION

Imagine a revolutionary home entertainment system that allows users to load movies and music from DVDs and CDs onto one device, a hybrid digital jukebox of sorts. Furthermore, the digital jukebox could transmit the multimedia content via a high-speed network server to any connected audio/video device in the home. Once loaded onto the server, the DVDs and CDs would no longer be needed to access the digital content, which results in conveniently accessible entertainment. Remarkably, such a product already exists; behold the Kaleidescape! However, the remarkable Kaleidescape has garnered public notice not for its innovative technology but rather as a new topic in the ongoing digital rights debate.

The Superior Court of California's decision in *DVD Copy Control Ass'n v. Kaleidescape, Inc.*<sup>1</sup> marks a significant victory in favor of consumers' rights to fair use of their digital content in the home. In December 2004, the DVD Copy Control Association, Inc. ("DVD CCA") filed a lawsuit against Kaleidescape, Inc. ("Kaleidescape") alleging that the Kaleidescape system breached the DVD CCA's Content Scramble System ("CSS") license agreement by creating a product that allowed users to copy DVDs that were encrypted with CSS technology onto Kaleidescape's hard-drive server.<sup>2</sup> The Superior Court of California ruled in favor

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<sup>1</sup> Reporter's Transcript of Proceedings, *DVD Copy Control Ass'n v. Kaleidescape, Inc.*, No. 1-04-CV031829 (Cal. Super. Ct. Mar. 29, 2007), <http://www.kaleidescape.com/files/legal/DVDCCA-vs-Kaleidescape-Statement-of-Decision.pdf> (court's oral statement of decision); see also Addendum to Statement of Decision at 1, *Kaleidescape*, No. 1-04-CV031829, <http://www.kaleidescape.com/files/legal/DVDCCA-vs-Kaleidescape-Addendum-to-Statement-of-Decision.pdf> (adopting the court's March 29, 2007 oral statement of decision as the actual statement of decision with a few modifications).

<sup>2</sup> See Letter from Michael Malcolm, Founder and CEO, Kaleidescape, Inc., to Members of Content Protection Advisory Counsel, DVD Copy Control Ass'n (June 15, 2007), <http://www.kaleidescape.com/files/legal/Kaleidescape-DVDCCA-Letter-20070615.pdf> ("[T]he DVD CCA filed a lawsuit against Kaleidescape in December 2004 alleging that the Kaleidescape System breached the CSS License

of Kaleidescape, but the decision did not have copyright implications because the decision was limited to contractual issues.<sup>3</sup> Yet, the case marked a significant shift in the digital rights debate in favor of consumers.<sup>4</sup> In the past, the debate over the notion of “fair use” in reference to copyrighted entertainment content within the inhibitive parameters set by the Digital Millennium Copyright Act (“DMCA”) had been difficult and one-sided, in favor of the entertainment industry, which holds the copyrights to the content.<sup>5</sup> Accordingly, the DMCA’s anticircumvention provisions have limited innovation for developing future technology in relation to digital entertainment and diminished the rights of consumers to enjoy their digital content even within their own homes.<sup>6</sup> Thus, the significance of the *Kaleidescape* decision is potentially enormous because it marks a victory for the consumers in the digital rights debate at the expense of the copyright holders.<sup>7</sup> Furthermore, the decision signals that the wall of copyright protection that the DMCA provided for the copyright owners is beginning to crack, a promising development for proponents who are calling for the return of the “fair use” of digital content.

This comment proposes that the copyright holders of the movie industry should authorize licensees of the DVD CCA to develop products that allow consumers full control over and access to their legally purchased digital content. By allowing licensed DVD CCA members to develop such products, the movie industry’s desire to limit content piracy by criminals can be upheld without restricting consumers’ rights to experience digital content in their homes. This comment examines the DMCA and its ramifications in prior cases with regard to copyright content to summarize the detrimental effects that the restrictive digital rights policies have had on consumers. This comment also explains that the Fair Use Act of 2007 reflects a need for change in the current state of digital rights protection policies, and interprets the *Kaleidescape* decision and the music industry’s recent abandonment of digital rights management (“DRM”) as evidence of a current trend toward abandoning restrictive encryption protections on digital content. Therefore, in light of the *Kaleidescape* decision, the recent changes in the specific sectors of the digital entertainment industry, and proposed changes made in Congress, it appears that the pendulum in the digital rights debate is swinging in a new direction.

Accordingly, this comment suggests that the DVD CCA should adapt to the ever growing demands of technologically savvy consumers and loosen the reins on digital rights protection by allowing DVD CCA members to create products that provide consumers full control over their digital content. Section II describes the relevant

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Agreement.”); DVD Copy Control Association, DVD Copy Control Association / Kaleidescape case – Frequently Asked Questions and Answers, [http://www.dvdcca.org/faqK1\\_2\\_.pdf](http://www.dvdcca.org/faqK1_2_.pdf) (explaining that the DVD CCA sued Kaleidescape for breach of the CSS License, arguing “that a home entertainment system manufactured by Kaleidescape breached certain provisions of the CSS License that require the physical DVD disc to be present in the device during playback of a movie”).

<sup>3</sup> See Addendum to Statement of Decision at 7, *Kaleidescape*, No. 1-04-CV031829, <http://www.kaleidescape.com/files/legal/DVDCCA-vs-Kaleidescape-Addendum-to-Statement-of-Decision.pdf> (explaining that it was “not necessary to rule on defendant’s copyright defenses or to determine whether copyright law was applicable” because “the court accepted this case as a breach of contract case”).

<sup>4</sup> Julie Jacobson, *Kaleidescape Prevails in DVD Ripping Case*, CEPRO, Mar. 29, 2007, [http://www.cepro.com/article/kaleidescape\\_prevails\\_in\\_dvd\\_ripping\\_case](http://www.cepro.com/article/kaleidescape_prevails_in_dvd_ripping_case).

<sup>5</sup> See *infra* Section III (discussing cases regarding consumer challenges to DMCA).

<sup>6</sup> See *infra* Section III (discussing cases regarding consumer challenges to DMCA).

<sup>7</sup> See *infra* Section III (discussing cases regarding consumer challenges to DMCA).

technology, statutes, and case law that comprise the current structure of digital rights. Section III explains the significance of the *Kaleidescape* decision and the need for change in digital rights policies. Section IV suggests a compromise that will allow the movie industry to maintain control of their content yet allow consumers to enjoy fair use of their legally attained digital content.

## II. BACKGROUND

### A. Brief History of DMCA and its Impact on the Movie Industry

The original standard for determining copyright infringement in relation to copy-making technologies was defined by the U.S. Supreme Court in *Sony Corp. of America v. Universal City Studios*.<sup>8</sup> In *Sony*, the Court held that the sale of copy-making technology to the general public did not constitute contributory infringement of copyright material if the device provided substantial noninfringing use to the general public.<sup>9</sup> However, in 1998, Congress enacted the Digital Millennium Copyright Act (“DMCA”), which effectively replaced the *Sony* decision and set a new restrictive standard for copy-making technology.<sup>10</sup> The DMCA prohibited the circumvention of copy protection systems and the removal of copyright management information on copyrighted work for media devices including DVDs.<sup>11</sup> Accordingly, the DMCA substantially limited the ability of individuals and organizations to create or use copy-making technology, as the noninfringing use exception was no longer applicable to copy-making devices.<sup>12</sup>

As new copy-making products, which enabled consumers to reproduce near flawless copies of the original copyright material, were continually introduced into the market, an inevitable tension surfaced between copyright holders and consumers. Specifically, as DVDs became the preferred medium to view video content, an onslaught of litigation between the movie studios and consumers arose over the

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<sup>8</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). In *Sony*, owners of copyrights of television programs brought a copyright infringement action against manufacturers of home videotape recorders. *Id.* at 419-20.

<sup>9</sup> *Id.* at 442 (“[T]he sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.”). Subsequently, the videotape recorder technology was fully embraced by the public and manufactured in substantial numbers. *See id.* at 422.

<sup>10</sup> Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.). *See generally* Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095, 1103-10 (2003) (stating that the DMCA “was touted as legislation necessary to fulfill the United States’ obligations under the World Intellectual Property Organization Copyright Treaty,” which required parties to provide legal protection and legal remedies against the circumvention of technological measures).

<sup>11</sup> *See Burk, supra* note 10, at 1105 (explaining that the DMCA anticircumvention device provisions are aimed at two different types of technological measures: (1) “devices that circumvent technological measures that control access to a copyrighted work” and (2) “devices that circumvent technological measures that protect the rights of a copyright holder in a work or portion of a work” (citing 17 U.S.C. § 1201(a)(2), (b)(1) (2006))).

<sup>12</sup> *See id.* (explaining that there is no provision in the DMCA “for devices necessary to gain access or circumvent rights controls in order to make fair use or other uses permissible under the copyright act”).

interpretation and constitutionality of the DMCA.<sup>13</sup>

## B. The Technology

### 1. *Digital Versatile Disc Technology (“DVD”)*

The digital versatile disc, more commonly known as the “DVD,” has become the new preferred method of presenting video content to the general public market.<sup>14</sup> DVD is the new standard in optical disc storage technology.<sup>15</sup> DVDs are designed to hold an expansive amount of information, much more than the CD, making the DVD an ideal medium to encode movies, which are large data files.<sup>16</sup> Essentially, a DVD can hold near-studio-quality video content, because DVDs encode video in a digital format.<sup>17</sup> In addition, video content encoded on a DVD maintains excellent audio quality.<sup>18</sup> Accordingly, given the technological advantages provided by the DVD, movie studios use DVDs as the standard format for distributing films to the general public.<sup>19</sup>

### 2. *Content Scrambling System (“CSS”)*

Content Scrambling System (“CSS”) is an authentication and encryption system used to protect the intellectual property rights of the movie-studio-produced DVDs.<sup>20</sup> Without an encryption protecting the contents, DVDs can be perfectly copied, thus creating pirating opportunities by unauthorized copying and distributing of films that are sold by the movie studios.<sup>21</sup> CSS is a data encryption and authentication system intended to prevent unauthorized copying of video content from DVDs.<sup>22</sup> The CSS decryption algorithm generates an encryption key that hides the disc keys and title keys that are needed to decrypt video content from the DVD.<sup>23</sup> CSS licensees must create DVD players that have a CSS decryption module that decrypts the data prior to decoding and displaying the video content.<sup>24</sup> DVD players with the authorized license keys allow a user to access the video content encoded on a CSS-protected DVD but prevent reading of the pure binary data written on the disc, thereby

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<sup>13</sup> See *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1089 (N.D. Cal. 2004) (granting movie studios’ motion for partial summary judgment after a seller of software for copying DVDs sought declaration that it did not infringe on movie studios’ copyrights); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 303 (S.D.N.Y. 2000), *aff’d sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (enjoining Internet web site owners from posting downloadable software that bypassed encryption protection on DVDs after movie studios brought action under the DMCA).

<sup>14</sup> Jim Taylor, *DVD Demystified, DVD Frequently Asked Questions*, <http://www.dvddemystified.com/dvdfaq.html> (last visited Sept. 11 2008).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See Jim Taylor, *supra* note 14 (explaining that movie studios all support DVDs as a medium to distribute motion pictures).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See Jim Taylor, *supra* note 14.

preventing the duplication of the content.<sup>25</sup>

CSS provides two layers of protection: the authentication ensures that a DVD and DVD player are compatible, and the decryption algorithm regulates the deactivation of play keys that are necessary to view the DVD content.<sup>26</sup> Thus, CSS is seen as an effective form of copy protection that relies on industry monopoly for the distribution of electronic keys that restrict access to the copyrighted movies to DVD players that are made by CSS-licensed manufacturers.<sup>27</sup> Therefore, the DVD Copyright Control Association (“DVD CCA”), which administers the CSS licenses, maintains strict control over the content encoded on DVDs.<sup>28</sup> The DVD CCA’s oversight over the CSS licenses benefits the owners of the copyrighted content, which includes most of the major movie studios.<sup>29</sup>

### 3. *Digital Rights Management (“DRM”)*

Digital Rights Management (“DRM”) is an umbrella term that describes the protection of copyright property through the use of technological measures.<sup>30</sup> DRM has been used by those in the entertainment industry to prevent unauthorized duplications of their work.<sup>31</sup> Specific to the music industry, music labels have required a DRM as a precondition to sell their music.<sup>32</sup> However, the music industry’s attempt to implement DRM systems in audio CDs has failed repeatedly.<sup>33</sup> Thus, currently there is a movement towards abandoning DRM protections on consumer music.<sup>34</sup>

## B. Relevant Laws in the Current Digital Rights Debate

### 1. *Digital Millennium Copyright Act (“DMCA”)*

In 1996, the United States government entered into the World Intellectual

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<sup>25</sup> Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 309-11 (S.D.N.Y. 2000), *aff’d sub nom.* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (“With CSS in place, the studios introduced DVDs on the consumer market in early 1997. All or most of the motion pictures released on DVD were, and continue to be, encrypted with CSS technology. Over 4,000 motion pictures now have been released in DVD format in the United States, and movies are being issued on DVD at the rate of over 40 new titles per month in addition to re-releases of classic films.”).

<sup>28</sup> *Id.* at 310 n.60.

<sup>29</sup> *Id.* at 309-11.

<sup>30</sup> See Wikipedia, Digital Rights Management, [http://en.wikipedia.org/wiki/Digital\\_rights\\_management#DRM\\_and\\_music](http://en.wikipedia.org/wiki/Digital_rights_management#DRM_and_music) (last visited Nov. 17, 2007) (defining DRM as “a generic term that refers to access control technologies used by hardware manufacturers, publishers, and copyright holders to limit usage of digital media or devices”). See generally *id.* (providing a general description of DRM, particular to the music industry).

<sup>31</sup> *Id.*

<sup>32</sup> See Steve Jobs, CEO, Apple, Inc., Thoughts on Music (Feb. 6, 2007), <http://www.apple.com/hotnews/thoughtsonmusic> (explaining Apple’s position on DRM and why consumers should pressure music companies to make their music DRM-free).

<sup>33</sup> See Lorraine Woellert, *Sony BMG Ends a Legal Nightmare*, BUS. WK. ONLINE, Dec. 20, 2005, [http://www.businessweek.com/technology/content/dec2005/tc20051230\\_658336.htm](http://www.businessweek.com/technology/content/dec2005/tc20051230_658336.htm) (discussing the impact of consumer litigation against Sony for using DRM that detrimentally affected consumers’ computers).

<sup>34</sup> Jobs, *supra* note 32.

Property Organization (“WIPO”) Copyright Treaty in an effort to provide legal protection to the American media market in the global community.<sup>35</sup> Thereafter, Congress enacted the Digital Millennium Copyright Act (“DMCA”) to comply with the treaty requirements and preemptively protect the technologically-based content industries.<sup>36</sup> The DMCA contains many provisions protecting copyrights.<sup>37</sup> For purposes of this comment, the discussion will be limited to the anticircumvention provisions of the DMCA. The anticircumvention provisions create liability for three different types of acts: (1) circumvention of access control devices, (2) trafficking in technology for circumventing access control devices, and (3) trafficking in technology for circumventing copy control devices.<sup>38</sup> Consequently, because DVDs encoded with CSS require the DVD player to have the authorized license keys to play the disc, the prohibition of circumvention of access control applies.<sup>39</sup> Thus, circumventing CSS protections results in a DMCA violation.<sup>40</sup>

However, in drafting the DMCA, Congress recognized that necessary classes of circumvention activities could be useful to the public.<sup>41</sup> Specifically, the provisions of the DMCA embodied in 17 U.S.C. § 1201(c)(1) and § 1201(b)(1) can be interpreted to provide a fair use exception to the DMCA.<sup>42</sup> Moreover, if certain noninfringing uses of digital works have been “adversely affected” by the anticircumvention provision, the DMCA authorizes the exemption of those works from the DMCA.<sup>43</sup> Therefore, although the broad reach of the DMCA touches upon any content protected by control devices, exceptions to this reach can be found

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<sup>35</sup> World Intellectual Property Organization Copyright Treaty art. 14(1), Dec. 20, 1996, 36 I.L.M. 65, available at [http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs\\_wo033.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf) (signed by the United States on April 12, 1997, and entered into force on March 6, 2002); see also World Intellectual Property Organization, Summary of the WIPO Copyright Treaty, [http://www.wipo.int/treaties/en/ip/wct/summary\\_wct.html](http://www.wipo.int/treaties/en/ip/wct/summary_wct.html) (last visited Jan. 2, 2009) (“The Treaty obliges the Contracting Parties to provide legal remedies against the circumvention of technological measures (e.g., encryption) used by authors in connection with the exercise of their rights and against the removal or altering of information, such as certain data that identify works or their authors, necessary for the management (e.g., licensing, collecting and distribution of royalties) of their rights (‘rights management information’).”).

<sup>36</sup> Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.); see also Burk, *supra* note 10, at 1103-10.

<sup>37</sup> See, e.g., 17 U.S.C. § 1201(b)(1)(A) (2006) (“No person shall manufacture, import, offer to the public, provide, or otherwise traffic in 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 this title in a work or a portion thereof.”).

<sup>38</sup> 17 U.S.C. § 1201(a)(1)(A) (“No person shall circumvent a technological measure that effectively controls access to a work protected under this title.”); 17 U.S.C. § 1201(a)(2)(A) (“No person shall . . . traffic in any technology . . . that is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title.”); 17 U.S.C. § 1201(b)(1)(A) (“No person shall . . . traffic in any technology . . . 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 this title . . .”).

<sup>39</sup> See 17 U.S.C. § 1201(a)(1)(A), (a)(2)(A), (b)(1)(A).

<sup>40</sup> *Id.*

<sup>41</sup> COMPUTER SCI. & TELECOMM. BD., NAT’L RESEARCH COUNCIL, THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 105 (2000).

<sup>42</sup> See 17 U.S.C. § 1201(c)(1) (“Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.”). This is the section of the DMCA covering the circumvention of copyrighted systems. *Id.*

<sup>43</sup> 17 U.S.C. § 1201(a)(1)(B)-(C).

within the DMCA.<sup>44</sup>

In general, implementation of the DMCA and the entertainment industry's DRM protections that followed have diminished consumers' right to utilize the digital content they purchase. Specific to DVDs containing major motion pictures, courts have interpreted and legitimized the DMCA and its anticircumvention provisions by consistently ruling in favor of the movie industry's right to protect their digital content.<sup>45</sup>

## 2. *Fair Use Act*

On February 27, 2007, Virginia Representative Rick Boucher and California Representative John Doolittle introduced The Fair Use Act of 2007.<sup>46</sup> The proposed legislation attempts to protect the fair use rights of users of copyrighted material by providing consumers the right to use their digital media to their convenience.<sup>47</sup> The new proposal provides some exceptions to the DMCA to mitigate the adverse affects the law has on consumer rights.<sup>48</sup> For example, the proposed law allows consumers to bypass commercials and provides exceptions to librarians to preserve copyrighted collections regardless of DRM protection.<sup>49</sup> However, the Act continues to prevent consumers from copying DVDs even for legitimate purposes like creating backup copies of their DVDs.<sup>50</sup> Thus, the proposed Fair Use Act does not provide a haven for individuals wanting to copy protected DVDs for their personal use from the reach of the DMCA.<sup>51</sup>

However, the Fair Use Act of 2007 provides that if a product or service has substantial, commercially significant noninfringing use, the manufacturers of the product will be exempt from liability for the abuses of its users.<sup>52</sup> Moreover, the Act eases the restrictions placed on sharing content around the home or on a "personal network" as long as the users do not circumvent DRM protections to upload the

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<sup>44</sup> *Id.*

<sup>45</sup> *See, e.g.*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 434-35 (2d Cir. 2001).

<sup>46</sup> Freedom and Innovation Revitalizing U.S. Entrepreneurship (Fair Use) Act of 2007, H.R. 1201, 110th Cong. (2007); *see also* Online Office of Congressman Rich Boucher, Reps. Boucher and Doolittle Introduce the Fair Use Act of 2007, [http://www.boucher.house.gov/index.php?option=com\\_content&task=view&id=1011&Itemid=75](http://www.boucher.house.gov/index.php?option=com_content&task=view&id=1011&Itemid=75) (last visited Jan. 2, 2009).

<sup>47</sup> *See* Introduction to the Fair Use Act of 2007, 153 CONG. REC. E407 (daily ed. Feb. 27, 2007), available at [http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=E407&dbname=2007\\_record](http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=E407&dbname=2007_record) (statement of Rep. Rick Boucher); Online Office of Congressman Rich Boucher, *supra* note 46.

<sup>48</sup> 153 CONG. REC. at E407 ("In an effort to address [industry content owners'] concerns, I have . . . crafted specific exemptions to section 1201 of the Digital Millennium Copyright Act which do not pose a comparable potential threat to their business models."); Online Office of Congressman Rich Boucher, *supra* note 46.

<sup>49</sup> Julie Jacobson, *The Fair Use Act Would Allow In-Home Content Sharing, not DVD Ripping*, CEPRO, Mar. 3, 2007, [http://www.cepro.com/article/fair\\_use\\_act\\_would\\_allow\\_in\\_home\\_content\\_sharing\\_not\\_dvd\\_ripping/](http://www.cepro.com/article/fair_use_act_would_allow_in_home_content_sharing_not_dvd_ripping/).

<sup>50</sup> 153 CONG. REC. at E407 ("[T]he revised bill does not contain the provision which would have established a fair use defense to the act of circumvention. I continue to believe that there should be such an exemption in the law, but content owners have expressed concern that enactment of such a provision could lead to widespread redistribution of audiovisual and other works."); Jacobson, *supra* note 49.

<sup>51</sup> Jacobson, *supra* note 49.

<sup>52</sup> *Id.*

content on the Internet.<sup>53</sup> Thus, the proposed Act appears to be an attempt to return to the standard found in *Sony* by protecting the manufacturers of products that have significant noninfringing use for the general public.

#### D. Case Law Expanding the Scope of DMCA

The broad anticircumvention language of the DMCA empowered the movie industry with a significant advantage by allowing the movie studios to challenge any technology created to bypass the encryption codes placed on DVDs regardless of the intended use for the technology. Subsequently, a line of decisions regarding the DMCA and DVD encryption bypass technology consistently found that any technology that allowed consumers to make copies of DVDs using encryption bypass technology was in violation of the DMCA.<sup>54</sup>

##### 1. *Universal City Studios, Inc. v. Corley*

Eric Corley maintained a website catering to individuals that were interested in techniques for circumventing protections of computer and computer data from unauthorized access.<sup>55</sup> In November of 1999, Corley posted a downloadable copy of DeCSS, a decryption computer program that was designed to circumvent the “Content Scramble System” (“CSS”) encryption technology placed on DVDs to prevent the unauthorized viewing and copying of motion pictures.<sup>56</sup> Thereafter, Universal City Studios sought injunctive relief, asking the District Court for the Southern District of New York to prevent Corley from posting DeCSS on his website.<sup>57</sup> The district court granted the requested injunction on behalf of Universal, and the Court of Appeals for the Second Circuit affirmed, holding that posting DeCSS fell within the privy of the anticircumvention provision of the DMCA.<sup>58</sup>

The court of appeals also ruled on Corley’s First Amendment claim that the DMCA violated his “free speech” rights.<sup>59</sup> The court held that DeCSS contained both a speech and a functional nonspeech component.<sup>60</sup> The court reasoned that DMCA targeted the nonspeech aspect of DeCSS by limiting the functional capability of the computer code.<sup>61</sup> Thus, the court reasoned that prohibiting the posting of DeCSS carried out the government’s interest of thwarting the unauthorized access to

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<sup>53</sup> *Id.*

<sup>54</sup> *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 435-36 (2d Cir. 2001) (holding that the DMCA prohibits computer software that bypasses encryption protection on DVDs and did not unconstitutionally eliminate owners’ fair use of copyrighted materials).

<sup>55</sup> *Id.* at 435.

<sup>56</sup> *Id.* A Norwegian teenager Jon Johansen created DeCSS in 1999 in order to bypass CSS the encryption protection placed on DVDs by motion picture studios. *Id.* at 437. The DeCSS program allowed a computer to decrypt the CSS protection placed on a DVD and furthermore allowed the user to copy files from the DVD onto the computer hard drive. *Id.* CSS is content scramble system encoded onto DVDs to prevent the copying of DVDs. DVD Copy Control Association, Frequently Asked Questions, <http://www.dvdcca.org/faq.html> (last visited Oct. 20, 2007). Manufacturers of DVD players license the right to decode CSS since only DVD players equipped with the CSS descrambler can read and play DVDs. *Corley*, 273 F.3d at 437.

<sup>57</sup> *Corley*, 273 F.3d at 429.

<sup>58</sup> *Id.* at 444-60.

<sup>59</sup> *Id.* at 453.

<sup>60</sup> *Id.* at 454.

<sup>61</sup> *Id.*

encrypted copyright material.<sup>62</sup>

The *Corley* decision set a precedent that the DMCA does not unconstitutionally limit the fair use of DVDs, and thus legitimized the DMCA as the new standard in determining copyright infringement issues concerning DVDs.<sup>63</sup> In addition, the decision signaled to the copyright community that any software designed to bypass the movie industry's protective measures to their copyright material will most likely be barred by the DMCA.<sup>64</sup>

## 2. *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*

Pursuant to *Corley*, the decision in *321 Studios v. Metro Goldwyn Mayer Studios, Inc.* reaffirmed that the DMCA prohibited software that permitted the copying of DVDs and that the anticircumvention provisions of the DMCA were indeed constitutional.<sup>65</sup> In 2001, 321 Studios produced "DVD Copy Plus" and "DVD X Copy" software, which enabled users to copy the contents of DVDs by bypassing DVD encryption protections.<sup>66</sup> However, unlike the DeCSS program that was specifically designed to crack the CSS encryption, 321 Studios' software was a bundled package that allowed users to create backup copies of DVDs without producing an identical copy of the DVD.<sup>67</sup> Instead, the software allowed users to copy portions of the DVD video onto a recordable CD.<sup>68</sup> Specifically, the software accessed data stored on a DVD, even if the content was protected with CSS, by using authorized CSS keys that could be obtained by licensed DVD players.<sup>69</sup> Essentially, 321 Studios claimed that its software did not violate the DMCA, because its software worked only on original DVDs that were already purchased by the consumer.<sup>70</sup> 321 Studios argued that the owner of a DVD has the right of a copyright holder.<sup>71</sup> Thus, providing consumers with a means of decrypting the CSS codes on the DVDs that they personally owned did not constitute circumvention within the meaning of 17 U.S.C. § 1202(a)(2).<sup>72</sup>

The *321 Studios* court held in favor of the movie industry and found that (1) DVD purchasers had the authority to view DVDs, but only licensed sellers of DVD players had authority to decrypt the encoding scheme; (2) the DMCA provision proscribing circumvention of copyright protection measures controlled the access to copyright material and not the copying, but the limitation affectively prevented copying; and (3) the First Amendment did not protect commercial speech that involved illegal activity.<sup>73</sup> Therefore, even 321 Studios' use of authorized decryption keys to allow

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<sup>62</sup> *Corley*, 273 F.3d at 454.

<sup>63</sup> See generally *id.* at 454-55 (explaining the general impact that the court's decision is likely to have on consumers and the digital community).

<sup>64</sup> *Id.*

<sup>65</sup> *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1096-99 (N.D. Cal. 2004).

<sup>66</sup> *Id.* at 1089.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 1094-95.

<sup>70</sup> *321 Studios*, 307 F. Supp. 2d at 1094-95.

<sup>71</sup> *Id.* at 1095.

<sup>72</sup> *Id.* at 1096.

<sup>73</sup> *Id.* at 1096-99.

purchasers of DVDs to make backup copies was prohibited by the DMCA.<sup>74</sup> The court reasoned that because the software was primarily designed and produced to circumvent the encoding scheme, it would fall privy to the DMCA anticircumvention provision.<sup>75</sup>

One view of *321 Studios* is that the decision signaled a great blow to consumer rights with regard to their legally purchased DVDs in that the court essentially limited such rights to viewing the video content and nothing else. Accordingly, *321 Studios* expanded the court's interpretation of the DMCA as merely prohibiting hackers and pirates of DVDs with illegally obtained content. Instead, movie studios were able to use the DMCA to limit consumer rights to legally purchased DVDs and thwart the creation of any technology that could provide consumers with greater control of their DVD property by decoding the CSS encryption. However, allowing the DMCA to intrude on personal rights of consumers was in conflict with the public's right to use copyrighted works for fair use purposes, a right that is explicitly recognized by Congress.<sup>76</sup>

### III. A NEW DIRECTION

Although *DVD Copy Control Ass'n v. Kaleidescape, Inc.* ultimately rested on contractual issues, the decision significantly deviated from preceding caselaw regarding CSS encryption.<sup>77</sup> Kaleidescape, Inc. was a fellow member of the DVD CCA and a licensee of CSS.<sup>78</sup> The Kaleidescape system consisted of three primary components: the Kaleidescape reader, server, and movie player.<sup>79</sup> An ethernet line connected the reader to the server, and the server to the movie player.<sup>80</sup> The system allowed users to insert DVDs into the reader and copy the contents of the DVDs to the server.<sup>81</sup> The users could then use the movie player to access and play the contents copied from the original DVDs without the actual DVD.<sup>82</sup>

DVD CCA's complaint alleged that the CSS license agreement provided that all implementations of CSS in hardware or software must be designed in a manner to stop attempts to defeat the copy protection functions of CSS.<sup>83</sup> Thus, under the terms of the CSS license, the DVD CCA claimed that licensees were prohibited from producing and selling any product that inhibited any of the CSS protections.<sup>84</sup>

The court held that Kaleidescape was fully compliant with the CSS license agreement and that the company's sales of Kaleidescape system caused no harm to

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<sup>74</sup> *Id.* at 1096.

<sup>75</sup> *321 Studios*, 307 F. Supp. 2d at 1098.

<sup>76</sup> *See* 17 U.S.C. § 107 (2006) (providing that the "fair use of a copyrighted work . . . is not an infringement of copyright").

<sup>77</sup> Jacobson, *supra* note 4.

<sup>78</sup> *DVD Copy Control Ass'n v. Kaleidescape, Inc.*, No. H030489, 2007 WL 2063101, at \*1 (Cal. Ct. App. Jul. 19, 2007).

<sup>79</sup> Kaleidescape, The Kaleidescape System, <http://www.kaleidescape.com/products/> (last visited Dec. 20, 2008).

<sup>80</sup> *See id.* (describing how the Kaleidescape system works).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Complaint at 2-3, *DVD Copy Control Ass'n v. Kaleidescape, Inc.*, No. 1-04-CV031829 (Cal. Super. Ct. Mar. 29, 2007).

<sup>84</sup> *Id.* at 4-5.

DVD CCA or its members.<sup>85</sup> The court found nothing in the CSS license agreement that prohibited the development of products that allow users to copy their DVDs.<sup>86</sup> Similarly, the court found nothing in the agreement that required a DVD to be present during playback.<sup>87</sup> Thus, the court concluded that the Kaleidescape system did not breach any conditions of the CSS license.<sup>88</sup>

Although the debate over the Kaleidescape system is far from over, the *Kaleidescape* decision lends promise that under specific conditions technology manufacturers can offer consumers the opportunity to the unfettered fair use of their DVDs. By rewarding the development of technology that substantially benefits the general public, *Kaleidescape* appears to be a return to the standard established in *Sony Corp. of America v. Universal City Studios*.<sup>89</sup>

#### IV. DEVELOPING A MIDDLE GROUND

Recent developments in the ongoing debate over the DMCA and the use of DRM protections threaten to disturb the one-sided advantage that movie studios have long enjoyed. In particular, the music industry's decision to phase out DRM from its music content, the newly proposed Fair Use Act of 2007, and the *Kaleidescape* decision indicate that the stranglehold of the DMCA may be loosened in the years ahead. More importantly, if the movie industry, via the DVD CCA, accepts the *Kaleidescape* decision and allows DVD CCA-licensed members to develop products whereby consumers can copy their digital content for domestic use, the movie industry can bypass the legal and public dissension experienced by the music industry. Thus, it appears that DVD CCA members like Kaleidescape can offer a compromising middle ground between the movie studios and the consumers.

##### A. The Music Industry's Acceptance of a DRM-free Future

The recent decision by some of the major music industry companies to remove DRM from their content affirms the position that the detrimental consequences of DRM protections overshadow its benefits. In early 2007, Steve Jobs, CEO of Apple, Inc., posted "Thoughts on Music," where he called for the music industry's abandonment of DRM technology from downloadable music.<sup>90</sup> The article explained that Apple (and other manufacturers of music players) had to create a DRM system, which envelops each song purchased through Apple's iTunes online music store in a special and secret software that cannot be played on unauthorized devices, in order to obtain the right to distribute music from the "big four" music companies: Universal, Sony BMG, Warner, and EMI.<sup>91</sup> Moreover, DRM

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<sup>85</sup> Reporter's Transcript of Proceedings at 63-65, *Kaleidescape*, No. 1-04-CV031829, <http://www.kaleidescape.com/files/legal/DVDCCA-vs-Kaleidescape-Statement-of-Decision.pdf> (court's oral statement of decision).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 65.

<sup>89</sup> 464 U.S. 417 (1984).

<sup>90</sup> Jobs, *supra* note 32.

<sup>91</sup> *Id.* (explaining that when Apple approached the "big four" companies to license their music to distribute legally over the Internet, "they were extremely cautious and required Apple to protect their music from being illegally copied").

requirements frustrate consumers since the music purchased from one manufacturer will only play on that manufacturer's device, creating a market where consumers must choose one device and are limited to only purchasing music compatible with that device.<sup>92</sup> Jobs also expressed his belief that DRM provides no benefits to the music companies since CDs, which are sold DRM-free, account for over ninety percent of purchased music.<sup>93</sup> Jobs suggested three alternatives to fixing the current problem, one of which was the abandonment of DRM from downloadable music. Jobs indicated that this path was "clearly the best alternative for consumers."<sup>94</sup>

Jobs's article describes one of the key dilemmas of the digital age: manufacturers are inhibited in creating innovative products because of restrictions placed on digital content by the copyright-owning industries. DRM was clearly not working to halt music piracy since individuals easily cracked the DRM protections, which required manufacturers to frequently update their DRM systems.<sup>95</sup> Jobs was merely reiterating the rally cry of the general public: DRM detrimentally affects the music industry, and DRM-free music is the cure. Much like the general public, Jobs believed that eliminating DRM from music could result in an influx of new companies investing to create innovative music stores and players, which would benefit the industry as a whole.<sup>96</sup>

The music industry has reluctantly accepted a DRM-free future, as the "big four" music companies have indicated that they will collectively abandon DRM technology from their music.<sup>97</sup> However, the companies were not simply persuaded by Steve Jobs's plea. Instead, in the wake of the Sony BMG Rootkit incident, the industry realized that intrusive nature of DRM and the lack of interoperability between devices frustrated consumers.<sup>98</sup> Most importantly, the music industry was suffering from mediocre song and album sales, which was attributed to the use of DRM protection.<sup>99</sup> The move to provide DRM-free music has been successful as Apple's iTunes online music store began offering EMI Music's entire digital catalog of songs for purchase without DRM protections.<sup>100</sup> Several major music retailers

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* ("Though the big four music companies require that all their music sold online be protected with DRMs, these same music companies continue to sell billions of CDs a year which contain completely unprotected music. That's right! No DRM system was ever developed for the CD, so all the music distributed on CDs can be easily uploaded to the Internet, then (illegally) downloaded and played on any computer or player.").

<sup>94</sup> *Id.*

<sup>95</sup> Jobs, *supra* note 32.

<sup>96</sup> *Id.*

<sup>97</sup> Posting of Andrew Dubber to New Music Strategies, <http://newmusicstrategies.com/2006/11/12/major-labels-to-abandon-drm/> (Nov. 12, 2006) (explaining that according to Paul Birch, a member of the executive committee and main board of the International Federation of Phonographic Institutes, "the major labels have decided to abandon Digital Rights Management").

<sup>98</sup> Sony BMG was sued for using DRM technology that included a flawed computer program in their CDs, which created security, privacy, and consumer protection problems. Electronic Frontier Foundation, Sony BMG Litigation Info, <http://www EFF.org/cases/sony-bmg-litigation-info> (last visited, Jan. 2, 2009). The programs left computers vulnerable to viruses and were extremely difficult to remove. Paul R. La Monica, Editor-at-Large, CNNMoney.com, Apple Chief Challenges Record Labels on DRM Efforts (Feb. 7, 2007), <http://money.cnn.com/2007/02/07/commentary/mediabiz/index.htm>.

<sup>99</sup> See La Monica, *supra* note 98.

<sup>100</sup> Apple.com, Apple Unveils Higher Quality DRM-Free Music on the iTunes store, <http://www.apple.com/pr/library/2007/04/02itunes.html> (last visited Jan. 2, 2009).

followed, as Amazon, RealNetworks, and Wal-Mart each decided to carry Universal Music Group's DRM-free music catalog.<sup>101</sup>

It appears that the music industry conquered its paranoia over possible piracy of its licensed content and accepted that DRM (at least in its current state) was harmful to the music industry in that it alienated consumers with an intrusive and restrictive means of controlling music content. The combination of consumer frustration, manufacturers' requests to remove DRM, and falling music sales served as a catalyst to the removal of DRM from digital music. The music industry's decision to remove DRM is a very encouraging development for consumer rights in the digital age as it signals that the music industry realizes that restrictive control by licensees is detrimental to both consumers and copyright holders.

The music industry's decision to remove DRM protections is a possible foreshadowing of a similar revolution for the CSS-protected DVDs. The implementation of CSS in DVDs is similar to the use of DRM on digital music content in that both measures developed out of the same fear: an onslaught of digital piracy.<sup>102</sup> Driven by this fear, movie studios have zealously protected their copyrighted content and, much like companies in the music industry, the movie studios are experiencing some of the same pitfalls.

The music industry's experience with DRM eerily parallels the ongoing problems in the movie industry with regard to CSS-protected DVDs. First, CSS-protected DVDs frustrate the consumer populations, as evidenced by a plethora of web-based blogs that publicly denounce the use of CSS.<sup>103</sup> Second, DVD sales have dropped considerably in the past few years after experiencing a surge in sales from 1999 to 2004. For example, in 2007 DVD sales fell twenty-four percent from the previous year.<sup>104</sup> Finally, with the emergence of new technology like video iPods,<sup>105</sup> and video share websites such as YouTube,<sup>106</sup> the medium for digital films is no longer confined to physical DVDs. Accordingly, the movie studios must decide whether to continue with CSS protection on their digital content or embrace the music industry's decision to abandon content restriction.

A complete abandonment of CSS protection on DVDs seems unlikely given the industry's paranoia over piracy of their copyrighted content.<sup>107</sup> However, authorizing DVD CCA members that abide by the terms of CSS license agreements to make products that allow consumers to circumvent CSS for personal use seems to be a reasonable compromise. As noted, the movie industry's DVD sales are suffering, and its ability to protect digital content on DVDs is far from perfect. Yet,

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<sup>101</sup> Jeff Leeds, *Universal Music Will Sell Songs Without Copy Protection*, N.Y. TIMES, Aug. 10, 2007, available at <http://www.nytimes.com/2007/08/10/business/10music.html>.

<sup>102</sup> See Diane M. Barker, *Defining the Contours of the Digital Millennium Copyright Act: The Growing Body of Case Law Surrounding the DMCA*, 20 BERKELEY TECH. L.J. 47, 49 (2005) (discussing the creation and adoption of the Digital Millennium Copyright Act).

<sup>103</sup> See, e.g., Posting of Ed Felten to Freedom to Tinker, <http://www.freedom-to-tinker.com/?p=734> (Dec. 9, 2004, 5:52am); Electronic Frontier Foundation, *Deeplinks Blogs Related to Digital Video*, <http://www.eff.org/related/3499/blog> (last visited Jan. 2, 2009).

<sup>104</sup> Posting by Kim Peterson to Top Stocks Blog, <http://blogs.moneycentral.msn.com/topstocks/archive/2007/11/14/dvd-sales-drop-can-hollywood-make-a-profit.aspx> (Nov. 14, 2007, 6:11am) (predicting that movie studios would suffer \$1.9 billion pretax losses on movies in 2007).

<sup>105</sup> Apple, iPod Classic, <http://www.apple.com/ipodclassic/> (last visited Jan. 2, 2009).

<sup>106</sup> YouTube, <http://youtube.com/> (last visited Jan. 2, 2009).

<sup>107</sup> Barker, *supra* note 102.

Kaleidescape, a member of the DVD CCA, made a product within the parameters set by the CSS license agreement and got sued for doing so.<sup>108</sup> Specifically, the Kaleidescape system gives consumers greater control of their DVDs while upholding the piracy protection measures implemented by the DVD CCA. Kaleidescape's efforts should be rewarded and mimicked, not chastised, for allowing consumers maximum control of their digital content. Without new products like the Kaleidescape, it is likely that the movie studios will suffer the same difficulties experienced by the music industry. As exemplified by the music industry's struggle, adhering to a rigid policy of content control will likely lead to public dissatisfaction and threaten the DVD industry as a whole. Similar to Steve Jobs's sentiments regarding the music industry, allowing DVD CCA members the freedom to develop innovative technology will benefit the industry as a whole.<sup>109</sup>

#### B. The Proposed Fair Use Act of 2007 Provides New Hope

As evidenced by the proposed Fair Use Act of 2007 (the "Act"), legislators have likely realized that CSS and other types of DRM shielded by the DMCA must be mitigated to reinstate the consumer's right to noninfringing use of copyrighted content. If enacted, the proposed Act would provide consumers with a significant victory in the digital rights debate. Specifically, the Act legitimizes and codifies the legislative concern over the adverse effects that the DMCA has had on consumer rights to digital copyrighted works, especially works protected by DRM.<sup>110</sup> Although the Act is still far from providing consumers with an unbridled right to copy, circumvent, or alter digital content, it provides two significant changes that can level the playing field between license holders and consumers.<sup>111</sup> First, the Act exempts manufacturers that create products that provide substantial, commercially significant noninfringing use from liability for abuses by users. Second, the Act relaxes restrictions on sharing content around the home or on a "personal network," as long as users do not circumvent DRM protections to upload their digital content to the World Wide Web.<sup>112</sup> In sum, the Act will restore the right of fair use, which has been muddled in the application of the DMCA, as a congressionally-recognized protection of consumer rights.<sup>113</sup>

The proposed Act confirms that legislators were aware of the possible adverse affects of the DMCA, and, accordingly, the Act attempts to temper some of these detrimental consequences.<sup>114</sup> The language of 17 U.S.C. § 1201(a)(1)(C), the rulemaking proceeding provision of the DMCA, indicates that legislators were aware that the DMCA might inhibit use of protected works by individuals that were not

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<sup>108</sup> Reporter's Transcript of Proceedings at 63-65, *DVD Copy Control Ass'n v. Kaleidescape, Inc.*, No. 1-04-CV031829 (Cal. Super. Ct. Mar. 29, 2007), <http://www.kaleidescape.com/files/legal/DVDCCA-vs-Kaleidescape-Statement-of-Decision.pdf> (court's oral statement of decision).

<sup>109</sup> Jobs, *supra* note 32 (stating that fewer restrictions to digital content provides incentives for manufacturers to develop innovative technology).

<sup>110</sup> See Online Office of Congressman Rich Boucher, *supra* note 46 (explaining why it is necessary to correct the threat the DMCA has created on consumer rights).

<sup>111</sup> *Id.*

<sup>112</sup> Jacobson, *supra* note 49.

<sup>113</sup> *Id.*

<sup>114</sup> Online Office of Congressman Rich Boucher, *supra* note 46.

purposely engaging in pirating or circumventing technology.<sup>115</sup> The rulemaking proceeding provision empowers the Librarian of Congress, upon the recommendation of the Register of Copyrights, Assistant Secretary for Communications, and Information of Department of Commerce, to develop a list of classes of works, the fair use of which has been or will be adversely affected by the DMCA in three-year intervals.<sup>116</sup> Works classified in this list are exempt from liability during the succeeding three-year period.<sup>117</sup> Even though the protections afforded by this rulemaking proceeding are limited in that the exemptions only apply to a particular class of copyrighted works and are subject to a time limit, it confirms that Congress was aware that the DMCA might have unintentionally overbroad reach.<sup>118</sup> Thus, the proposed Act is consistent with legislators' original intent in enacting the DMCA, which was to protect copyright holders from piracy and unethical circumvention of their works without restricting or intruding on consumer rights to access such works.

Furthermore, the Act limits the reach of the DMCA by resurrecting a touchstone of copyright law, the fair use doctrine, thru language that recalls the *Sony* decision. Exempting from liability for infringement products that provide "substantial noninfringing uses" to the general public<sup>119</sup> has remained an important principle of copyright law.<sup>120</sup> Accordingly, it is unlikely that Congress intended to eliminate this principle by passing the DMCA. However, the fair use doctrine has been muddled within the confines of the DMCA because the statute does not explicitly reject or affirm its applicability. The words "fair use" are used in the text 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."<sup>121</sup> Yet, the term "fair use" as used in § 1201(c)(1) has been characterized as Congress's intent for the fair use defense to apply to actions performed after a person gains authorized access to a work and not to acts of circumvention.<sup>122</sup>

However, the discussion does not end here. Because in the very same report by the House of Representatives, Congress explicitly expressed that fair use should

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<sup>115</sup> 17 U.S.C. § 1201(a)(1)(C) (2006) ("During the 2-year period described in subparagraph (A), and during each succeeding 3-year period, the Librarian of Congress . . . shall make the determination in a rulemaking proceeding for purposes of subparagraph (B) of whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works.").

<sup>116</sup> *Id.* § 1201(a)(1)(C)-(D).

<sup>117</sup> *Id.* § 1201(a)(1)(D) ("The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works for the ensuing 3-year period.").

<sup>118</sup> *Id.*

<sup>119</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

<sup>120</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) ("From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose . . .").

<sup>121</sup> 17 U.S.C. § 1201(c)(1).

<sup>122</sup> *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 322-23 (S.D.N.Y. 2000), *aff'd sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (citing H.R. REP. NO. 105-551, pt. 1, at 18 (1998)).

apply to acts of circumvention.<sup>123</sup> The proposed Act communicates the need for change in the application of the DMCA without overtly overturning the current system of content control exercised by the movie industry. The Act carves out an exception for manufacturers that create products that benefit the public by providing greater control.<sup>124</sup> It appears that the Act continues the prohibition on illegal pirating of digital content and the development of circumventing software by private individuals, but rewards manufactures that legally find ways to substantially benefit the public. Therefore, by specifically eliminating the liability of manufacturers of products that provide substantial and noninfringing use to the general public, the proposed Act is a step towards rediscovering the fair use principle within the DMCA.

Regardless of whether or not the Act is adopted by Congress, the Act marks a significant change in ideals with regard to the protection of digital content. By proposing the Act, legislators recognize the need for some kind of change to mitigate the use of DRM by the entertainment industry.<sup>125</sup> Further, the Act confirms that the DMCA was not intended to eliminate the fair use doctrine from the copyright infringement analysis.<sup>126</sup> Therefore, amidst the constant litigation over the DMCA and the public outcry for the right to fair use of digital content, it appears that Congress has recognized the need to mitigate movie studios' use of the DMCA as a defense against consumer challenges to digital content protection and provide incentives for the development of new technology to give greater control over digital content to the public.

### C. The *Kaleidescape* Decision: A Turning Point in the Digital Rights Debate

The Superior Court of California's decision in *Kaleidescape* was based on contractual issues, but nonetheless the decision was considered a victory for proponents of consumer digital rights with regard to CSS protected DVDs.<sup>127</sup> *Kaleidescape*'s victory marks one of the few (if not only) times that the movie studios, via the DVD CCA, have lost a challenge to their use of the DMCA to restrictively control the digital content in DVDs. As expected, the DVD CCA is challenging the decision and filed an appeal in June of 2007.<sup>128</sup> Although the true impact of the *Kaleidescape* decision will not be felt until the appeal hearing, examining the *Kaleidescape* case provides optimistic hope for the future of consumers' right to fair use of DVDs through the use of innovative technology like the *Kaleidescape* system.

Prior to *Kaleidescape*, courts relied on the DMCA to dismiss challenges to the

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<sup>123</sup> H.R. REP. NO. 105-551, pt. 1, at 18 (“[A]n individual would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of a work which he or she has acquired lawfully.”).

<sup>124</sup> Jacobson, *supra* note 49.

<sup>125</sup> See, e.g., Online Office of Congressman Rich Boucher, *supra* note 46.

<sup>126</sup> Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 846 (2001).

<sup>127</sup> Jacobson, *supra* note 4.

<sup>128</sup> DVD Copy Control Association, <http://www.dvcca.org/> (noting that on December 17, 2007, “[t]he DVCCA filed its opening appellate brief with the California Court of Appeal in its case against *Kaleidescape* for breach of the CSS license agreement) (last visited Jan. 2, 2009).

movie studios' use of CSS to protect their copyrighted content.<sup>129</sup> As previously mentioned, the lawsuits in *Corley*, *321 Studios*, and *Reimerdes* centered around the circumvention of CSS in order to access movie studios' digital content, and in each case courts decided in favor of the movie studios.<sup>130</sup> The message was clear: the courts would not tolerate the use of illegal programs like DeCSS to circumvent the security measures put in place by the movie studios.<sup>131</sup> Thus, individual consumers' efforts to bypass CSS would inherently violate the DMCA.

In contrast, *Kaleidescape* did not involve a consumer's use of an illegal computer program to hack the CSS protection of DVDs.<sup>132</sup> In *Kaleidescape*, a DVD CCA licensee developed an incredible new product that allowed consumers to bypass CSS protections to create a digital video jukebox in their own home.<sup>133</sup> *Kaleidescape* was not a free-floating software available to the masses (like DeCSS) for hacking purposes nor was it capable of creating pirated DVDs.<sup>134</sup> In fact, *Kaleidescape* took specific measures to remain compliant to the DVD CCA license agreement by preventing the digital content burned on to the *Kaleidescape* server from being uploaded on to the Internet, which avoided possible exposure of DVD decryption keys.<sup>135</sup> As *Kaleidescape* claimed, its system safeguarded the DVD content better than the actual discs.<sup>136</sup> Thus, the DVD CCA's decision to sue one of its own licensees that had complied with all of the specifications of the license agreement signaled that even legitimate attempts to develop technology to increase consumer control of digital content would be challenged.<sup>137</sup> This magnifies the importance of the *Kaleidescape* case because, by deciding on behalf of *Kaleidescape*, the court provided an opportunity for manufacturers to stand in the massive digital gap between the movie studios use of CSS and consumers' right to use legally purchased copyrighted content.

In addition, the *Kaleidescape* decision exposed the fact that the DMCA is overly restrictive and is being used in a way contrary to the purpose under which the statute was created. One of the purposes in enacting the DMCA was to promote the continued growth and development of modern digital technology by providing protections to copyrighted digital works in a manner that assures a continued economic benefit for such works.<sup>138</sup> By attacking companies like *Kaleidescape*, the

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<sup>129</sup> See, e.g., *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); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), *aff'd sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

<sup>130</sup> *Corley*, 273 F.3d at 429; *321 Studios*, 307 F. Supp. 2d at 1085; *Reimerdes*, 111 F. Supp. 2d at 294.

<sup>131</sup> *Corely*, 273 F.3d at 454.

<sup>132</sup> Jacobson, *supra* note 4.

<sup>133</sup> *Kaleidescape*, The *Kaleidescape* System, <http://www.kaleidescape.com/products/> (last visited Jan. 2, 2009).

<sup>134</sup> *Id.*

<sup>135</sup> Accord Jacobson, *supra* note 4.

<sup>136</sup> Economist.com, Criminalising the Consumer, [http://www.economist.com/science/displaystory.cfm?story\\_id=9096421](http://www.economist.com/science/displaystory.cfm?story_id=9096421) (last visited Jan. 2, 2009).

<sup>137</sup> *Id.*

<sup>138</sup> H.R. REP. NO. 105-551, pt. 1, at 23 (1998). The Senate Judiciary Committee Report predicts, for example, that the Act will "create the legal platform for launching the global digital on-line marketplace for copyright works" and will "make available via the Internet, the movies, music, software, and literary works that are the fruit of American creative genius." S. REP. NO. 105-190, at 2 (1998).

DVD CCA seems to be ignoring this purpose.

Currently, under the threat of violating the DMCA, manufacturers have little incentive to create innovative technology to provide consumers with an opportunity to exercise control of their digital content because most lack the DVD CCA license.<sup>139</sup> Movie studios are relying on the DMCA to validate their use of CSS, which hurts the consumer more than any other party involved since manufacturers lack incentives to create products to utilize the digital content of the DVD.<sup>140</sup> However, considering the fact that the movie industry relies heavily on DVD sales to make a profit, the restrictive controls do not provide benefits for any party involved.<sup>141</sup> The tension between the three parties will continue to build as consumers will demand new technology and manufacturers will desire to comply. If the movie studios continue to hamper this process, ultimately they will bear the cost. As described by the proponents of the Fair Use Act of 2007, without a change in the DMCA, consumers will purchase less digital media if the use of such media is continually restricted, which in turn reduces the incentive for manufacturers to introduce new products into the market.<sup>142</sup>

The *Kaleidescape* case continues the persistent debate over consumers' right to fair use of digital content, specifically the right to make copies of films purchased on DVD. Although the Kaleidescape system allows consumers to view their movies without the presence of a physical DVD, the digital content is placed on the system server only after making a copy from a validly purchased DVD.<sup>143</sup> One of the key arguments made by the DVD CCA was that Kaleidescape was in violation of the CSS license agreement by permitting a DVD's content to be played without the physical DVD.<sup>144</sup> The *Kaleidescape* court dismissed this contention by stating that such a requirement was lacking for the particular CSS license agreement at hand.<sup>145</sup> Nonetheless, this claim clearly raises fair use concerns.

The fair use debate has firmly entrenched itself in the application of the DMCA and it remains applicable to consumers' rights with regard to DVD content. Legislators have commented that pursuant to the DMCA, an individual is prohibited from circumventing copyright protection schemes to gain unauthorized access to work but should maintain the ability to make fair use of a work that the consumer has acquired lawfully.<sup>146</sup> This highlights the importance of obtaining copyrighted work legally before circumventing technical measures. Accordingly, consumers that purchase DVDs are legally obtaining the copyrighted digital content stored on the DVDs. The Kaleidescape system allows consumers to safeguard their films by storing the content on the system's server.<sup>147</sup> Thus, DVD CCA's attempt to penalize Kaleidescape for providing consumers with a product that enhances their use of

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<sup>139</sup> Online Office of Congressman Rich Boucher, *supra* note 46.

<sup>140</sup> *Id.*

<sup>141</sup> Criminalising the Consumer, *supra* note 136.

<sup>142</sup> Online Office of Congressman Rich Boucher, *supra* note 46.

<sup>143</sup> Kaleidescape, *supra* note 133.

<sup>144</sup> DVD Copy Control Association, *supra* note 128.

<sup>145</sup> Reporter's Transcript of Proceedings at 63-65, DVD Copy Control Ass'n v. Kaleidescape, Inc., No. 1-04-CV031829 (Cal. Super. Ct. Mar. 29, 2007), <http://www.kaleidescape.com/files/legal/DVDCCA-vs-Kaleidescape-Statement-of-Decision.pdf>.

<sup>146</sup> H.R. REP. NO. 105-551, pt. 1, at 18 (1998).

<sup>147</sup> Criminalising the Consumer, *supra* note 136.

legally purchased content seems to infringe upon the underlying legislative intent of the DMCA.

In sum, although the legal ramifications of the *Kaleidescape* decision have not yet surfaced, the case clearly raises pivotal issues that surround the DVD CCA's use of CSS technology. Moreover, the case can serve as important precedent for future litigation regarding DMCA violations by restoring the fair use principles that were present at the creation of the statute. *Kaleidescape's* struggle with the DVD CCA illustrates the need for a change. Companies that develop products that enhance consumers' rights to fair use of their purchased digital content, and prevent illegal piracy of that content, are beneficial to the movie industry and society as a whole, and thus should be praised, not sued. *Kaleidescape's* system straddles the thin line between offering a blank check to the general public with regard to digital rights and the overbearing restrictive control exercised by the DVD CCA. It appears that some of the manufacturers are up to the challenge of bridging the gap between the consumers and the movie industry. These manufacturers are the key to a digital world in which movie studios and consumers can agree on a middle ground with regard to control and access of digital content.

#### V. CONCLUSION

The dust has yet to settle on the digital rights debate concerning CSS protection of DVDs; however, the law is finally beginning to benefit the general consumer.<sup>148</sup> Some positions remain constant: (1) the movie studios remain persistent in protecting their digital content due to their fear of piracy,<sup>149</sup> (2) consumers demand greater control of their digital content;<sup>150</sup> and (3) manufacturers desire and expect freedom to develop innovative technology.<sup>151</sup> It is evident that these issues will not be resolved overnight. Nonetheless, there have been significant developments that will continue to set the new parameters of the debate. Most importantly, the music industry's abandonment of DRM protection on digital music, the proposed Fair Use Act of 2007, and the recent *Kaleidescape* victory clearly signal that the momentum has finally swung to benefit the consumer's cause.

The recent developments with regard to DRM signals a remarkable change in digital rights. The movie studios' use of DRM as legitimized by the impregnable authority provided by the DMCA is starting to crack. Litigation regarding digital rights over DVD content will continue in the future if the movie studios refuse to alter their position. Moreover, if the courts restore the *Sony* standard of protecting technology that provides substantial noninfringing use to the general public, the movie studios will suffer a huge blow in this debate.<sup>152</sup>

The parameters of this debate will continue to change. Technology regarding digital films continues to evolve, as evidenced by the development of products like the video iPod.<sup>153</sup> In fact, in September of 2007, a group of electronics firms, technology developers, and movie studios approved new technology that will allow

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<sup>148</sup> *Id.*

<sup>149</sup> Barker, *supra* note 102.

<sup>150</sup> Deeplinks Blogs Related to Digital Video, *supra* note 103.

<sup>151</sup> Jacobson, *supra* note 49.

<sup>152</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

<sup>153</sup> Apple, iPod Classic, *supra* note 105.

consumers to burn films that are downloaded from online services onto DVDs without the restriction of CSS.<sup>154</sup> In light of these changes, the movie industry should place its trust in the members of the DVD CCA that are able to develop innovative products that both protect their interests as well as benefit the public as a whole. The pendulum has yet to fully swing toward a CSS-free DVD future, but the momentum is building. Allowing manufacturers to bridge the gap between the restrictive past and the uninhibited future is the best option for the movie industry.

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<sup>154</sup> Mark Hefflinger, *Industry Approves DVD Download-to-Burn Technology*, DIGITAL MEDIA WIRE, Sept. 21, 2007, <http://www.dmwmedia.com/news/2007/09/21/industry-approves-dvd-download-to-burn-technology>.