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As the world has transitioned into an increasingly digital marketplace, it has become necessary for copyright owners to offer their works in digital format.[1] However, copyright holders were hesitant to release their works in digital form because of the ease with which someone could infringe upon their rights by creating, distributing, and downloading unlicensed copies of works. These activities can be prevented or deterred by technological protections. Therefore, copyright owners only began to release their work in digital form once they felt that there were sufficient technological protections, such as encryption software on DVDs, in place for their works.[2]

Once technological protections were implemented to prevent infringement of copyrighted works, infringers began to circumvent such measures. In response, Congress enacted the Digital Millennium Copyright Act[3] (DMCA or the "Act") in 1998 in order to prevent the circumvention of technological protections placed on copyrighted works[4] and promote the digitization of copyrighted works by providing owners with more enforceable rights, specifically against individuals who circumvent the technological protections in place, to frustrate infringement activities.[5] The DMCA has accomplished this end, as evidenced by the rich marketplace of digital content we enjoy today.[6] However, this progress faces potential erosion as a result of the misinterpretation of the DMCA by the courts. The DMCA anti-circumvention provisions have been interpreted narrowly, which provides little protection against the circumvention of the technological protections used to battle infringement activity.

As a result of such decisions, copyright owners may once again become wary of offering their works in the digital marketplace. Circumvention of the technological protections used to protect copyrighted works destroys the copyright holder's ability

1. *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 435 (2d Cir. 2001).

2. *Id*. at 436.

3. WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998, Pub. L. No. 105-304, § 101, 112 Stat. 2860 (1998) (implementing the World Intellectual Property Organization Copyright Treaty and Performance and Phonograms Treaty within U. S. copyright law).

4. *See id.* § 1201.

5. *Universal*, 273 F.3d at 435.

6. *See* Jeffrey Neu, *IP, the Law, and Innovation*, Technology and the Law (Feb. 14, 2011), http://www.jeffreyneu.com/20110214289/ip-the-law-and-innovation.html ("[T]he DMCA . . . provided for the proliferation of blogs, online communities, [and] services like Twitter and YouTube.").

to receive "fair compensation" for their creative works.[7] This in turn undermines the goals of the U.S. copyright system under the U.S. Constitution.[8]

In *MGE UPS Systems Inc. v. GE Consumer & Industrial Inc.*, the Fifth Circuit held that the defendants (GE/PMI) did not circumvent the plaintiff's (MGE) software protections and, therefore, were not in violation of the DMCA.[9] Specifically, the court reasoned that because MGE offered no evidence that a GE/PMI employee altered MGE's software and that because use of the software subsequent to alteration did not constitute circumvention, MGE failed to show that GE/PMI had circumvented MGE's technological protections under the DMCA.[10]

This case comment contends that the Fifth Circuit misinterpreted the meaning of "circumvention" under DMCA § 1201(a)(1)(A)[11] and § 1201(a)(3)(A)–(B)[12] and reached a decision contrary to the explicit purpose of the DMCA by holding that once a work's technological protections have been bypassed or avoided for the first time, any subsequent use of the work would not amount to circumvention of its technological protections. The court's decision reduces the viability of the enforcement mechanisms provided for in the DMCA by reducing the applicability of the anti-circumvention provisions to a narrow subset of activity which, in turn, deprives copyright owners of the ability to obtain fair compensation.[13]

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7. *See Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 110th Cong. 13–15 (2007) [hereinafter *Updating the Performance Right*] (statement of Marybeth Peters, The Register of Copyrights) ("In order for the industry to continue to enrich society, performers and record labels must be able to make a living by creating the works that broadcasters, webcasters and consumer electronic companies are so eager to exploit for profit."), http://judiciary.house.gov/hearings/July2007/Peters070731.pdf (last visited Oct. 15, 2011); Alfred C. Yen, *What Federal Gun Control Can Teach Us About the DMCA's Anti-Trafficking Provisions*, 2003 Wis. L. Rev. 649, 695.

8. *See* U.S. Const. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

9. 622 F.3d 361, 366 (5th Cir. 2010).

10. *See id.* at 1126. However, MGE offered evidence that GE/PMI employees used the software after alteration had taken place. *Id.*

11. "No person shall circumvent a technological measure that effectively controls access to a work protected under this title." 17 U.S.C. § 1201(a)(1)(A) (2006).

12. As used in these subsections—

> (A) to "circumvent a technological measure" means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and (B) a technological measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

17 U.S.C. § 1201(a)(3)(A)–(B) (2006).

13. *See* Brief of Amici Curiae Entm't Software Ass'n, et al. in Support of Appellant's Petition for Rehearing en banc at 7–8, MGE UPS Sys., Inc. v. GE Consumer & Indus., Inc., 622 F.3d 361 (5th Cir. 2010) (No. 08-10521), 2010 WL 4851679, at *7–8 [hereinafter *Entm't Software Ass'n*].

Specifically, the court erred by relying on the Second Circuit's approach to determining what constitutes circumvention under the DMCA, that is, because § 1201(a)(1) is targeted at circumvention, it does not apply to the use of copyrighted works after the technological measure has been circumvented.[14] By following the Second Circuit's interpretation, the *MGE UPS Systems* court failed to analyze the conduct of GE/PMI employees and the actual method of circumvention those employees used to gain access to MGE's software. Following the Eighth Circuit's analysis regarding whether MGE's technology effectively controlled access to their copyrighted software would have better promoted the purposes of the DMCA.

In *MGE UPS Systems*, MGE manufactures uninterruptible power supply (UPS) machines that are used during power outages to maintain power to vital computer systems and servers.[15] Some of these devices require the use of MGE's copyrighted software for servicing.[16] The software enables a technician to perform complete maintenance that could not be done without the software.[17] Certain tasks, such as calibration and voltage adjustment, are only possible while running the software.[18]

Operating MGE's software requires the presence of an external hardware security key called a "dongle"[19] that is inserted in the computer's serial port.[20] Each dongle has an individual expiration date and a maximum number of uses, and requires a password.[21] When MGE's software is activated, it looks for a properly programmed dongle before it can fully launch.[22] When launched, the software runs through a second series of protocol exchanges with data located on the UPS machine being serviced in order to confirm that MGE software is communicating with MGE hardware.[23] If the protocol exchange is successful, MGE's software collects system status information for the technician.[24]

GE/PMI is in the business of servicing UPS machines, and hired MGE to perform service on MGE UPS machines.[25] At some time before June 2000, a group of GE/PMI employees acquired a cracked copy of MGE's software from an unknown

14. *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 443 (2d Cir. 2001) ("[T]he DMCA targets the *circumvention* of digital walls guarding copyrighted material (and trafficking in circumvention tools), but does not concern itself with the *use* of those materials after circumvention has occurred.").

15. *MGE UPS Sys.*, 622 F.3d at 364.

16. *Id.*

17. *Id.*

18. *Id.*

19. A dongle is a device similar to the USB memory sticks widely used today.

20. *MGE UPS Sys.*, 622 F.3d at 364.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

source.[26] GE/PMI maintained and used at least one laptop with an unlicensed copy of MGE software.[27] One of GE/PMI's employees personally used the software program on a number of occasions, and GE/PMI used the MGE software without the required dongle, meaning that GE/PMI was engaging in unauthorized used of the MGE software.[28] GE/PMI later admitted to recovering a laptop from a former employee that contained cracked MGE software and also admitted that the software had been used five times from June 2000 through May 2002, presumably without the presence of the dongle security key.[29]

In December 2004, MGE filed suit against GE/PMI in federal district court for various violations of MGE's intellectual property rights in its software, including copyright infringement, misappropriation of trade secrets, and DMCA violations.[30] MGE claimed that GE/PMI used its software without authorization 428 times.[31] During the subsequent trial, the district court dismissed the DMCA claim and provided no reasoning for doing so.[32]

On appeal to the Fifth Circuit, MGE argued that the district court erred in dismissing the DMCA claim because GE/PMI had in fact cracked MGE's software.[33] MGE argued that because GE/PMI was unable to obtain licenses to legally use MGE's software, GE/PMI employees circulated emails discussing ways to bypass the software's technological protections and ultimately did so.[34]

GE/PMI argued that no GE/PMI employee or representative had actually "circumvented" the software's security features pursuant to the DMCA.[35] GE/PMI argued that a GE/PMI employee or representative had merely used the software

26. *Id.* Software hackers posted general instructions on the Internet about how to defeat the external security features of a hardware key, though not referencing MGE specifically. *See, e.g.*, Zeezee, Zen and the Art of Dongle Cracking (Dec. 27, 1997), http://www.woodmann.com/fravia/zee__4.htm.

27. Brief of Appellant at 11–13, MGE UPS Sys., Inc., v. Power Prot. Servs., LLC, 622 F.3d 361 (5th Cir. 2009) (No. 08-10521), 2009 WL 7170924, at *11–13 ("Both witnesses testified that the Pacret program was used without an external hardware security key. Both testified that the Pacret software had been 'cracked.'") (internal citations omitted).

28. *Id.*

29. *Id.*; *MGE UPS Sys.*, 622 F.3d at 364.

30. *MGE UPS Sys.*, 622 F.3d at 364.

31. *Id.* (noting that some of these uses occurred "after the district court granted MGE a preliminary injunction against GE/PMI's use of MGE's software").

32. *Id.* at 365. As for MGE's other claims, the jury awarded MGE damages of $4,624,000 for misappropriation of trade secrets. *Id.*

33. *Id.*

34. Appellant's Resp. to Cross-Appeal and Reply at 2, MGE UPS Sys., Inc., v. Power Prot. Servs., LLC, 622 F.3d 361 (5th Cir. 2009) (No. 08-10521), 2009 WL 7170926 at *2.

35. *MGE UPS Sys.*, 622 F.3d at 365–66.

after some other party had disabled the code, and that this did not constitute a violation of the DMCA.[36]

The Fifth Circuit held that the GE/PMI's actions did not amount to circumvention.[37] The court identified the DMCA's anti-circumvention provision, which states, "No person shall circumvent a technological measure that effectively controls access to a work protected under this title."[38] The DMCA defines "circumvent[ing] a technological measure" as "descramb[ling] a scrambled work, decryp[ting] an encrypted work, or otherwise avoid[ing], bypass[ing], remov[ing], deactivat[ing], or impair[ing] a technological measure, without the authority of the copyright owner."[39] "[E]ffectively controls access to a work" means that "the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work."[40]

The Fifth Circuit affirmed the district court's dismissal that granted MGE's DMCA claim against GE/PMI.[41] The court reasoned that the issue was "not whether the technological measures that effectively controlled access to MGE's software were circumvented at some point, but whether the actions of GE/PMI's *own representatives* amounted to circumvention."[42] Thus, the court ultimately found that the actions of the GE/PMI did not amount to circumvention because it interpreted § 1201(a)(3)(A) as not prohibiting use of a copyrighted work subsequent to the initial circumvention.[43] The Fifth Circuit found that MGE failed to show that any GE/PMI employee had modified MGE's software so that the dongle would no longer be required for operation.[44] The court further explained that reading the DMCA to prohibit the use of copyrighted works after circumvention has taken place would be too broad an interpretation. Such an interpretation would result in an extension of the DMCA "beyond its intended purposes to reach extensive conduct already well-regulated by existing copyright law."[45]

This case comment contends that the Fifth Circuit misinterpreted the meaning of circumvention under the DMCA and reached a decision contrary to the explicit purposes of the DMCA by holding that once a work's technological protections have been bypassed or avoided for the first time, any subsequent uses of the work would

36. *Id.* at 365. ("As a result, GE/PMI argues, its actions did not violate the DMCA and would, at most, have amounted to copyright infringement.").

37. *Id.* at 366.

38. 17 U.S.C. § 1201(a)(1)(A) (2006).

39. *Id.* § 1201(a)(3)(A).

40. *Id.* § 1201(a)(3)(B).

41. *MGE UPS Sys.*, 622 F.3d at 366.

42. *Id.* (emphasis added).

43. *See id.*

44. *See id.*

45. *Id.*

not amount to circumvention of those technological protections. The following analysis will discuss the applicable case law in other circuits where courts have applied the DMCA anti-circumvention provision and explain how the Fifth Circuit should have interpreted this provision in light of the prior cases by analyzing whether MGE's technological protections effectively controlled access to MGE's copyrighted software. The court's decision is contrary to the purpose of promoting the digitization of copyrighted works by providing owners with more enforceable rights because it reduces the viability of the protections provided in the Act.[46] The Fifth Circuit's holding effectively nullifies the protection that the DMCA provides copyright owners against individuals who might circumvent technological protections and thus deprives the rights holders of fair compensation.[47] Fair compensation provides incentive for and enables individuals to create and contribute to society in the ways copyright law was designed to promote. If courts interpret statutory tools in ways that do not uphold such incentives, individuals are unlikely to put forth their beneficial contributions into society.

In the disposition of MGE's anti-circumvention claim, the Fifth Circuit relied solely on a Second Circuit case, *Universal City Studios, Inc. v. Corley*, which held that injunctions under the DMCA were not unconstitutional.[48] This reliance was improper for two reasons: First, the Fifth Circuit incorrectly applied the dicta set forth in *Universal* because it was not relevant to the provisions of the DMCA at issue in *MGE UPS Systems*. Second, there was a substantial difference in the technology at issue in the two cases.

In *Universal*, the plaintiff movie studios brought an action seeking injunctive relief against the defendant, Eric Corley, under the anti-trafficking provisions of the DMCA.[49] The plaintiffs claimed Corley violated the DMCA's anti-circumvention provision as well as the provisions against trafficking in circumvented material by posting an article on his website about hacking DVD encryption software.[50] The technology at issue was the Content Scramble System (CSS) implemented by movie studios to reduce piracy threatening their DVD releases.[51] CSS is encryption software that uses an algorithm configured by a set of keys to encrypt a DVD's contents, and therefore protect it against infringers.[52] The algorithm is a mathematical formula for

46. *See Entm't Software Ass'n., supra* note 13, at 7–8.

47. *See id.* at 7–8.

48. 273 F.3d 429 (2d Cir. 2001).

49. *Id.* at 436.

50. *Id.* at 435–36.

51. *Id.* at 436–37.

52. *Id.*

> CSS is the protection system that has enabled the owners of movie content to provide consumers access to high quality DVD movies for home viewing on their video systems and computers. CSS is made available to allow product manufacturers to offer exciting products for consumers to use to enjoy DVD motion pictures while also protecting those motion pictures from unauthorized duplication, protecting from infringement the

transforming a movie file into an unreadable and non-viewable format. The keys are strings of zeros and ones that serve as values for the mathematical formula.[53] In order to decrypt the CSS-protected files, a compliant DVD player must contain a set of player keys and understand the CSS encryption algorithm.[54] The DVD player cannot access the contents of a CSS-protected DVD without the player keys and the algorithm.[55] With the player keys and the algorithm, a DVD player can display the movie, but does not give a viewer the ability to copy the movie or to manipulate the digital content of the DVD.[56]

A teenage hacker named Jon Johansen developed a program called DeCSS that decrypted CSS-protected files.[57] Corley posted an article on his website about Johansen's DeCSS program, which explained that DeCSS could be used to copy DVDs. He also provided copies of the object and source code for DeCSS, enabling others to use it.[58] The movie studios, through the Internet investigations division of the Motion Picture Association of America (MPAA), became aware of the availability of DeCSS on the Internet and responded by sending out a number of cease and desist letters to website operators who posted the software, some of whom removed it from their sites.[59] In January 2000, the studios filed this lawsuit against defendant Eric Corley and two others.

The Second Circuit did not discuss § 1201(a)(1) with any depth, did not provide an analytical framework for determining whether circumvention has occurred under § 1201(a)(1), and did not go further than defining circumvention under § 1201(c)(1) differentiating it from the trafficking provisions of the DMCA.[60]

First, the Fifth Circuit's analysis of the § 1201(a)(1) anti-circumvention provision relied on a portion of the *Universal* opinion discussing § 1201(c)(1), which prohibits *trafficking* in circumventing technologies, such as distributing a program designed to circumvent a technological protection, not whether certain technologies constituted circumvention. There was no mention of §1201(a)(1) and no analysis of the anti-circumvention provision in the portion of *Universal* that the *MGE Systems* court cites to.[61] The Second Circuit instead focused its analysis on the trafficking of

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intellectual property contributed by the many writers, directors, actors, and producers who create such works.

About DVDCCA, DVD Copy Control Ass'n, http://www.dvdcca.org/about.aspx (last visited Oct. 15, 2011).

53. *Universal*, 273 F.3d at 436.

54. *Id.* at 437.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 439.

59. Universal City Studios, Inc. v. Reimerdes, 111 F.Supp.2d 294, 312 (S.D.N.Y. 2000).

60. *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 440–41 (2d Cir. 2001).

61. *See id.* at 444.

circumventing technology and ultimately decided the case on constitutional grounds because the appellant was attempting to argue that the DMCA was unconstitutionally broad in contravention of the First Amendment.[62]

Whether or not circumvention occurred was not the issue in *Universal*; instead the Second Circuit was analyzing a district court injunction that applied the DMCA to the defendants by imposing two types of prohibitions both grounded in the anti-trafficking provisions of the DMCA.[63] The first type prohibited posting DeCSS or any other technology for circumventing CSS on any website and the second type prohibited knowingly linking any Internet website to any other website containing DeCSS.[64] The Second Circuit did not interpret or apply the anti-circumvention provision.[65] The anti-circumvention provision prohibits the actual use of circumvention technology to obtain access to a copyrighted work without the copyright owner's authority,[66] whereas the anti-trafficking provisions focus on the trafficking in circumvention technology, regardless of whether it leads a third party to circumvent an access or copy control.[67] Therefore, the Fifth Circuit's reliance on *Universal* was misplaced because the Second Circuit did not apply the DMCA anti-circumvention provisions that were relevant in *MGE UPS Systems*.

Second, the difference in the technologies at issue in *Universal* and *MGE UPS Systems* is also significant. The CSS protection technology is distinct from the copyrighted movie contained on the DVD,[68] whereas the technological protection encoded in MGE's software is not distinct from the software itself; rather it is an integral part of the operation of the software. The CSS needs to be circumvented only once in order for someone to access the movie because subsequent copying and playing do not require bypassing the CSS program each time.[69] In contrast, the dongle used by MGE supplied the authentication information that was required to run MGE's software *each time the software was used*. Therefore, the cracked version of MGE's software circumvented the same authentication process each time it was used.[70] The court failed to recognize that each time GE/PMI employees used MGE's software they were circumventing the technology, unlike in *Universal* where the circumvention only needed to take place once for each DVD that was played or

62. *See id.* at 457–59.

63. *See id.* at 453–60.

64. *Id*. at 443.

65. *See id*.

66. *Circumvention vs. Trafficking in Circumvention Tools*, Computer Crime and Intellectual Property Sec. U.S. Dep't of Justice 187, http://www.cybercrime.gov/ipmanual/05ipma.html (last visited Oct. 15, 2011).

67. *Id*.

68. *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 436–38 (2d Cir. 2001) (discussing CSS technology).

69. *Id.*

70. MGE UPS Sys., Inc. v. GE Consumer & Indus., Inc., 622 F.3d 361, 364 (5th Cir. 2010).

copied. The difference between the two technologies weakens the court's reasoning and conclusion that, "[T]he actions by GE/PMI employees did not amount to circumvention. . . . Without proving GE/PMI actually circumvented the technology, MGE does not present a valid DMCA claim."[71]

In *Davidson & Assocs. v. Jung*, the Eighth Circuit analyzed the issue of circumvention under DMCA §1201(a)(1)(A).[72] The case was brought by the plaintiff copyright owners in computer software and online gaming systems against the defendant company that also offered online gaming services—services that exploited the plaintiff's protected properties.[73] In this case, the plaintiff sold gaming software and offered an additional online gaming service to purchasers of its games.[74] Installation of the game on the purchaser's personal computer required entry of a CD key as well as agreement to various licenses.[75]

The defendant's service was an emulator developed as an alternative to the plaintiff's online gaming system. The emulator allowed access to an online gaming service, identical to the plaintiff's but hosted on a different server, without the purchase of the plaintiff's games or entry of a valid CD key.[76] The defendant's emulator provided a server that allowed gamers unable or unwilling to connect to the plaintiff's online gaming system to nevertheless access and experience the multi-player features of the plaintiff's games.[77] The emulator attempted to mirror all of the user-visible features of the plaintiff's system, including online discussion forums and information about the emulator project, as well as access to the emulator's computer code for others to copy and modify.[78] The court found that a user could perceive no difference between the two services[79] and held that the defendant's site amounted to circumvention because it did not require a valid CD key and, as a result, allowed a user to freely play unauthorized copies of the plaintiff's game.[80]

The Fifth Circuit should have reached the same conclusion regarding GE/PMI's employees' actions in using a modified version of MGE's software that did not require the dongle. MGE's software is similar to that of the *Davidson* plaintiff, in that each requires a "key" of sorts to be operated with each use.[81] MGE's software required the dongle, whereas the *Davidson* plaintiff's software required a valid CD

71. *Id.* at 366.

72. 422 F.3d 630 (8th Cir. 2005).

73. *Id.* at 632.

74. *Id.* at 633.

75. *Id.*

76. *Id* at 635.

77. *Id.*

78. *Id.*

79. *See id.* at 636.

80. *See id.* at 642.

81. *Id.* at 635; MGE UPS Sys., Inc. v. GE Consumer & Indus., Inc., 622 F.3d 361, 364 (5th Cir. 2010).

key.[82] Each time the software of either company was operated, the programming code was designed to search for the "key." Consequently, each time GE/PMI employees operated the modified MGE software, the particular technology was circumvented in violation of the DMCA.[83]

The Fifth Circuit concluded that MGE's software had only been circumvented by the person who developed the cracked version and that GE/PMI's subsequent use of that version was not circumvention of a technical measure. The Fifth Circuit supported this latter conclusion by pointing to the fact that MGE failed to present evidence that a GE/PMI representative altered the software.[84] The Fifth Circuit's conclusion on this point ignores the fact that GE/PMI circumvented MGE's technological protection each time they operated the software without authorization. The technology was similar in *MGE* and *Davidson* and, therefore, the Fifth Circuit should have relied on the analytical framework applied in *Davidson* by analyzing whether MGE's dongle "effectively controlled access" to their software and whether GE/PMI employees bypassed the dongle each time they ran the software, rather than focusing on who circumvented the software.[85] As described previously, MGE's dongle effectively controlled access to its software because it provided security information, acting as a key that was required to gain access to and run MGE's software. GE/PMI employees bypassed the dongle, without authorization, each time they operated the software and were, therefore, circumventing a technological measure that effectively controlled access to MGE's software. By following the *Davidson* analysis, the Fifth Circuit would have interpreted circumvention under the DMCA to mean that each unauthorized use of software protected by means that effectively controlled access to the software, amounted to an act of circumvention of such protections. And in doing so, the court would have upheld the purposes of the DMCA.

The Fifth Circuit's decision frustrates Congress's purpose in enacting the DMCA. The DMCA was enacted because "Congress was concerned that, absent a strong federal prohibition on circumventing such technological locks, copyright owners would be unwilling to release digital versions of their works in online marketplaces."[86] DMCA § 1201(a) provides copyright owners with protection against individuals who might circumvent technological protections, thus depriving the owners of fair compensation.[87] The court even recognized this purpose of the DMCA

82. *Davidson*, 422 F.3d at 635.

83. *Id.* at 642.

84. *See MGE UPS Sys.*, 622 F.3d at 365.

85. *See Davidson*, 422 F.3d at 640.

86. Brief for the United States as Amicus Curiae Supporting Rehearing at 9, MGE UPS Sys., Inc. v. GE Consumer & Indus., Inc., 622 F.3d 361 (5th Cir. 2010) (No. 08-10521) (citing H.R. Rep. No. 105-551, Part II, at 23 (1998)).

87. *See* Brief of Amicus Curiae Motion Picture Ass'n Of America, Inc. in Support of Appellant's Petition for Rehearing *en banc* at 7–8, MGE UPS Sys., Inc. v. GE Consumer & Indus., Inc., 622 F.3d 361 (5th Cir. 2010) (No. 08-10521).

in its opinion, stating, "One of Congress' purposes behind enacting the DMCA was targeting the circumvention of technological protections."[88] Marybeth Peters, the acting Register of Copyrights, suggests that ensuring fair compensation serves as a stimulus for creators to develop new works in the future.[89] Strong incentives are needed for creators to continue their artistic endeavors and to encourage the continued development of technological advances, such as DRM,[90] that enable the legitimate exploitation of and ensure access to creative works.[91] Without protections such as the DMCA anti-circumvention provision, new technologies pose a risk of erosion of the rich digital marketplace for works.[92]

Contrary to the purpose of the DMCA,[93] the court's decision renders it much more difficult for copyright owners to enforce their rights against individuals who circumvent technological protections because, under the Fifth Circuit's interpretation, the anti-circumvention provision only applies to the first person to circumvent a technological protection and therefore does not apply to individuals who subsequently access the protected work, even if they do so by following the same methods and circumventing the protection. The Fifth Circuit effectively requires plaintiffs to show that an individual was the mastermind behind a circumvention measure. The court is unwilling to apply the anti-circumvention provision to subsequent circumvention activity once an initial circumvention has taken place. This reduces the applicability of the standard to a small subset of individuals who initially circumvent a technological protection. It does not apply to users who subsequently access the work by circumventing the protection, which in turn greatly reduces copyright holders' enforcement rights and limits their ability to bring claims against all infringers; they are effectively limited to only the smaller subset of individuals.[94]

Under the reasoning of *MGE UPS Systems*, if an individual with computer programming skills writes a computer program that is capable of generating serial numbers for software and makes that program freely available for download on the Internet, the program writer would be in violation of the DMCA anti-circumvention provision. However, any individuals who downloaded the program, use it to generate

88. *MGE UPS Sys.*, 622 F.3d at 365.

89. *See Updating the Performance Right, supra* note 7.

90. "DRM" stands for "digital rights management," which are access control technologies used by copyright holders to limit the use of digital content. *Digital Rights Management*, Wikipedia, http://en.wikipedia.org/wiki/Digital_rights_management (last modified Oct. 10, 2011). An example of DRM is MGE's dongle. Another well known example is Apple Inc.'s FairPlay technology, which is used to protect works available from the iTunes store.

91. *See Updating the Performance Right*, *supra* note 89.

92. *See id.*

93. H.R. Rep. No. 105-551, pt. 2, at 25 (1998) ("The Committee thus seeks to protect the interests of copyright owners in the digital environment, while ensuring that copyright law remain technology neural.").

94. Colin Folawn, *Neighborhood Watch: The Negation of Rights Caused by the Notice Requirement in Copyright Enforcement Under the Digital Millennium Copyright Act*, 26 Seattle U. L. Rev. 979, 979–80 (2003) ("Because they are unable to effectively enforce copyrights, independent copyright holders experience a negation of rights.").

a serial number, and use it to operate the software without purchasing the software would not be in violation of the circumvention provision. The individual who generates the serial number and uses it to operate the software is circumventing the technological protections in place for that software just as much as the person who wrote the code for the circumventing program, but only the person who created the generation software would be liable.

Such a result is contrary to the purpose of the DMCA because the copyright holder could only enforce their rights against the computer programmer and not against the individuals who circumvent the serial number technology in order to use software without paying for it.[95] Copyright owners would most certainly be unwilling to release their content into digital marketplaces if they can only enforce their rights against such a small subset of individuals and cannot reach the individuals truly violating their rights.[96] This will result in devolution of the digital content space because copyright owners will again feel threatened by infringement activity. Additionally, the law created by the Fifth Circuit establishes a disincentive to create and innovate, especially in the DRM space, because the DMCA cannot be used to enforce rights against individuals who truly circumvent DRM technology.

The Fifth Circuit reasoned that use of a copyrighted work subsequent to circumvention was an overbroad construction of §1201(a)(1)(A) that extended the DMCA beyond its intended purposes to reach conduct already covered by existing copyright law.[97] This reasoning is not supported by a correct interpretation of the statute. For example, David Nimmer characterizes circumventing a technological protection in place to protect a copyrighted work as "the electronic equivalent of breaking into a locked room in order to obtain a copy of a book."[98] Under this characterization, the Fifth Circuit's interpretation applies the DMCA only to the first person to break into the locked room by using a particular means. If a second person comes along after the room has been broken into and uses the same means as the first person to enter and take a book, they have not circumvented the protection and should only be liable for taking the book. Under criminal law principles, both individuals would be liable for trespass as well as theft, the second person would not face less liability because the first person did the breaking in. The second person had to circumvent the locked door; the first person that broke in simply made it easier for the second person to do so.

U.S. copyright law can be described as "statutory unfair competition based on the misappropriation rationale."[99] The law protects copyrighted "work against predatory

95. *See* S. Rep. No. 105-90, at 10–11 (1998).

96. *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 436 (2d Cir. 2001) ("[M]ovie studios were reluctant to release movies in digital form until they were confident they had in place adequate safeguards against piracy of their copyrighted movies.").

97. MGE UPS Sys., Inc. v. GE Consumer & Indus., Inc., 622 F.3d 361, 366 (5th Cir. 2010).

98. 2 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §12A.03[D][1] (Matthew Bender, rev. ed. 2011).

99. L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 Vand. L. Rev. 1, 6 (1987).

competitive practices."[100] Copyright law's constitutional purpose of promoting progress is served by encouraging the distribution of works. Congress encourages this through the DMCA by ensuring that creators receive fair compensation, making them willing to distribute their works to the public.[101] The Senate Report on the DMCA states that the Act enforces private parties' use of technological protection measures through legal sanctions for circumvention of such measures. Legal sanctions will be applied when a person has not obtained authorized access to a protected work for which the copyright owner has utilized a technological measure that effectively controls access to the work.[102]

Without strong incentives for creators to continue to offer their works in digital form and to encourage the continued development of technological advances that enable the legitimate exploitation of and ensure access to creative works, the diverse and expansive digital marketplace for works we enjoy today will degrade.[103] The Fifth Circuit's holding in *MGE UPS Systems* effectively nullifies this protection and obstructs this goal.

The Fifth Circuit misinterpreted the meaning of "circumvention" under § 1201(a)(1)(A) by using the Second Circuit's method of analysis, which was based on different provisions of the DMCA. Following the construction of the provision and analysis adopted by the Eighth Circuit in analogous cases would have been a better approach that promoted the purposes of the DMCA. Furthermore, the court failed to understand and distinguish the technological considerations at issue and did not conduct an analysis of the conduct of GE/PMI's employees and the actual circumvention method used to gain access to MGE's software with sufficient depth. In reaching a decision contrary to one of the explicit purposes of the DMCA, the court held that "bypass" and "avoid," as used in the statute, "do not . . . encompass use of a copyrighted work subsequent to circumvention merely because that use would have been subject to a technological measure that would have controlled access to the work, but for that circumvention."[104]

The Fifth Circuit should have relied on the analytical framework provided by *Davidson* by analyzing whether MGE's dongle "effectively control[led] access" to their software and whether GE/PMI employees bypassed or avoided the dongle.[105] By following the *Davidson* analysis, the Fifth Circuit would have applied an interpretation of circumvention, encompassing subsequent bypassing of a technological protection that upholds the purposes of the DMCA and provides copyright owners with fair compensation.

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100. *Id.*

101. *Id.* at 11.

102. S. Rep. No. 105-190, at 10–11.

103. *See id.* at 7.

104. *See* MGE UPS Sys., Inc. v. GE Consumer & Indus., Inc., 622 F.3d 361, 366 (5th Cir. 2010).

105. Davidson & Assocs. v. Jung, 422 F.3d 630, 640 (8th Cir. 2005).