BACK FROM THE FUTURE: A PROLEPTIC REVIEW OF THE DIGITAL MILLENNIUM COPYRIGHT ACT

By David Nimmer[†]

Some years back, I was privileged to offer a trio of ancient copyright decisions in the celebrated case of *Achilles v. Zeno*. David Nimmer, *An Odyssey Through Copyright's Vicarious Defenses*, 73 N.Y.U. L. REV. 162 (1998). More recently, while meditating upon the blank spaces between the lines of the Digital Millennium Copyright Act, I fell into an ecstatic trance in which the boundaries between myself and the universe faded. Vaulting ahead centuries, I chanced upon a judicial opinion from the far future. As on that earlier occasion, I present these matters unedited—except that, as an artifact of time travel, all citations to post-2001 authority seem to have mysteriously vanished.

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IN THE TRIBUNAL
FOR THE NEAR GALACTIC MASS
(NOVO THERMOPYLAE DIVISION)

In the matter of	)	
	)	Case No. CV 5761
	)	
1,934 CORTICALLY ACTIVATED TRANSPONDING DEVICES COMMONLY CALLED "Havona Servitals"	)	MEMORANDUM AND ORDER (HUMAN TRIAL REQUESTED)

SEER: Samuell ix9

Six centuries ago, the United States Congress passed the Digital Millennium Copyright Act. Two years ago, the Saturnine Standards Society promulgated technical measures to be followed by those now-ubiquitous devices first popularized by Caligastia Lanonandek, known to kids (and their external mindbots) everywhere as "Havona Servitals."

Respondent manufactures devices that do not comply with the stated measures. Hence, this action.

There is an undeniable irony in prosecuting an action in 2657, based on the failure to take measures promulgated only in 2655, when the statute under which this cause of action arises dates all the way back to a law passed in 1998. I have therefore adopted the utterly strange expedient of issuing an opinion in this matter, instead of merely effectuating judgment through the court's corps of superuniverse functionaries. In my own defense for such an outré denouement, let me protest that, historically speaking, it was actually not all that unusual for jurists in centuries past to prepare opinions in individual cases. (Strangely, some even divided the page in half, writing one commentary on the top and another on the bottom in smaller type, even though it would seem *prima facie* that the resulting product would be incomprehensible. *See* Abner J. Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647 (1985).).

I. INTRODUCTION

A. The Late Twentieth Century

On October 28, 1998, Congress passed an amendment to the Copyright Act called the Digital Millennium Copyright Act ("DMCA")—a much more modestly entitled corpus than succeeding amendments to the Copyright Act, such as the Universally Applicable Decree Mandating Self-Evident Goodness of 2103, or the Open-Your-Brain Ecphrasis of 2418. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998) (codified as amended in scattered sections of 17 U.S.C.).

Little is known at present of the DMCA's gestation period encompassing the end of the 20th Century. The consensus among historians holds that it was an ascetic and reticent period, almost monastic in tone, in which the supreme emphases were on contemplation and self-abnegation. Extreme modesty was highly prized.

The haziness of our current knowledge of that time period reflects a great irony. Evidently, the DMCA looked forward to a rosy digital future. Yet only scant decades later, the folly of that reliance became apparent after an electromagnetic catastrophe erased most knowledge of the past. That was the so-called Y2K+38 Bugaboo, whence the current proverb. *See* Jack E. Brown, *Portents of the Year 2000 Computer Problem*, 15 SANTA CLARA COMPUTER & HIGH TECH. L.J. 109, 115 n.20 (1999) (anticipating disaster, inter alia, as of Jan. 18, 2038). As stated by Deutero-Jacqueline Susann, "even contemporaries recognized the danger from the 'Rollerball scenario' in which 'a mad computer hacker were to destroy the total electronic memory of central libraries,' HENRY PETROSKI, THE BOOK ON THE BOOKSHELF 214 (1999). Yet the authorities failed to take the prospect seriously until it was too late. With the universal return of papyrus as the medium of record, the future is once again safe-guarded."

Of course, one of the surviving facts from that general time period was the Great Economic Meltdown, also called the Mycterismus of 2050. When it was over, as is well known, there were only three corporations left, two of them controlled by Bathsheba Berlusconi. Those considerations return to the fore below regarding the discussion of Macrovision Corp. and its regulation via the DMCA.

B. Passage of the Digital Millennium Copyright Act

What was the contemporary need as of 1998 for this massive enactment? Was it events of the past? Of the present? Or of the future? Someone named Jack Valenti testified on behalf of the Motion Picture Association of America (we don't know what "motion pictures" were, but they

must have been important). He told Congress in 1997 that the threat to his industry from digital exploitation of movies was "real and immediate." *The WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act*, *Hearing Before the Subcomm. on Courts and Intellectual Property*, *House Comm. on the Judiciary*, 105th Cong. 79 (1997) (statement of Jack Valenti, President and CEO, Motion Picture Association of America) ("Internet piracy is not a 'maybe' problem, a 'could be' problem, a 'might someday be' problem. It is a 'now' problem."). A year later, someone else testified on behalf of that same trade organization, the MPAA, that its "nightmare scenario" lay in the future: "Digital networks will *soon* make this complex and dangerous undertaking cheap and simple;" the danger, "*if it is realized*, will drive a stake through the heart of our hopes for the healthy growth of electronic commerce." *The WIPO Copyright Treaties Implementation Act*, *Hearing Before the Subcomm. on Telecommunications, Trade, and Consumer Protection, House Comm. on Commerce*, 105th Cong. 55 (1998) (statement of Steven J. Metalitz, on behalf of the Motion Picture Association of America) (emphasis added). Present and future, it seems, were impinging on one another even in the bill's past.

Of the legislative history leading up to the DMCA, few direct fragments have survived. *See* UMBERTO ECO, MISREADINGS 15 (William Weaver trans., Harcourt, Brace & Co. 1993) (1963). Enshrined at the Planetary Archives is the one surviving fragment of the original legislative history that led to this epochal enactment: "[W]hat was it that Wade Greski said, . . . I am trying to skate to where the puck is going, and not where we are today." *WIPO Copyright Treaties Implementation Act, Hearing Before the Subcomm. on Courts and Intellectual Property, supra*, at 111.

Though that catchphrase has become familiar to tyke-brains throughout the sector, it is not absolutely certain what Zoe Lofgren (whose subsequent celebrity I need scarcely rehearse here) meant by it. Popular wisdom has it that the Speaker of the House at that point was a certain otherwise unremembered Greski, who first instituted the Parliamentary device of recognizing speakers on the chamber floor through the ceremonial passage of a small silicon discus. But other theories abound—including the happenstance that an ancient player of a game called "hockey" bore the slightly similar name "Wayne Gretzky" (the only problem being that no one has ever been able to link that game to the DMCA).

C. Prolepsis

I would like to propound my own theory. Congress, I am speculating, passed the DMCA not based on where current reality was on the day of

passage. Instead, it was self-consciously trying to skate to where reality would be located in the future.

The term for this is *prolepsis*. An ancient dictionary contemporary with the DMCA defines *proleptic* as "[t]he use of a descriptive word in anticipation of the act or circumstance that would make it applicable." WEBSTER'S ENCYCLOPEDIC DICTIONARY 1351 (1990). The source gives as an illustration: "[t]hat gambler is a dead man: Sam Sneak has sworn to get him." *Id*.

The example is a felicitous one. Just as the gambler is alive now, but proleptically dead because of Sam Sneak's threat, the argument in this case is that Havona Servitals were lawful as of 1998 (none but the most visionary could even imagine their existence at that early date) but proleptically dead, *i.e*., unlawful for the future, because of the DMCA's threat.

(There is a vital distinction, though. In the posited case, at the moment of speaking, Sam Sneak has already targeted his ire against the gambler. In the case of the DMCA, by contrast, it did not target the Havona Servitals as of its enunciation in 1998. Instead, Congress said in 1998 that steps would be taken in the future, and that when that future dawned, those steps would gain the force of law.)

Speaking of death and prolepsis, there seems to be mystical bond between the two. Even the standard work on the subject illustrates the latter through an example of the former. *See* RICHARD A. LANHAM, A HANDLIST OF RHETORICAL TERMS 120 (2d ed. 1991) (drawing an example of prolepsis from 1 COR. 15: 35-37, "How are the dead raised up?"). The link is more ancient still—just consider *Deuteronomy* 17:6. According to the regnant *Oprah Winfrey Pesher*, the translation is "the death penalty requires two or three witnesses." The antique *King James Version* of the Bible comes closer to the original, though: "[a]t the mouth of two witnesses or three witnesses shall he that is worthy of death be put to death." But its rendition of "he that is worthy of death" misses the mark. The original Hebrew reads *yumat hamet*, *i.e.*, "the dead shall die." Of course, that formulation implicates a logical contradiction—if already dead, then the sinner will not be able to die again, so the future tense becomes inapposite; whereas saving the future tense deprives the sinner of his current "dead" moniker. The rabbis noted the solecism, of course, and thereby derived a homiletical lesson—one who sins has already committed spiritual suicide. BABYLONIAN TALMUD, TRACTATE SANHEDRIN 41a. Otherwise stated, the sinner is proleptically dead.

The Bible, of course, teaches timeless lessons, for our age no less than those past. One of its central strategies is "proleptic exposition or future-directed retrospect." MEIR STERNBERG, THE POETICS OF BIBLICAL NARRA-

TIVE: IDEOLOGICAL LITERATURE AND THE DRAMA OF READING 280 (1985). Prof. Sternberg enunciated that insight in his chapter *à propos* the instant inquiry, entitled *Temporal Discontinuity, Narrative Interest, and the Emergence of Meaning*. He noted that "retrospective incoherence signals (guarantees, invites) prospective coherence." *Id.* In that spirit, the instant opinion attempts to draw current coherence from the DMCA's retrospective incoherence.

II. FEATURES OF THE DIGITAL MILLENNIUM COPYRIGHT ACT

The Digital Millennium Copyright Act contains almost no instance of the word "future." Yet large swaths of it are intimately bound up in a prediction of how the world will subsequently unfold. Besides isolated features buried in elaborate provisions, *see* MELVILLE B. NIMMER & DAVID NIMMER, 2 NIMMER ON COPYRIGHT § 8.22[D][1][c] ns.311, 331 (2001) (future-oriented provisions of statutory license for subscription digital audio transmission services), whole features are devoted to future developments. The discussion below considers three.

A. Section 1201

1. Basic Provision

The single most potent pronouncement of the DMCA is contained in section 1201. *See* David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 675 (2000) [hereinafter Nimmer, *A Riff on Fair Use*]. That section commands at the outset: "[n]o 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) (Supp. 2000). When Congress passed that provision in 1998, what "technological measure" did it have in mind "that effectively controls access to a work"?

Congress itself concedes that it passed this provision in the expectation "that technological measures will most often be developed through consultative, private sector efforts." H.R. REP. NO. 105-796, at 64 (1998). It singled out for praise "multi-industry efforts to develop copy control technologies" that had been underway since 1996 and "strongly encourage[d] the continuation of those efforts. . . . " H.R. REP. NO. 105-551, pt. 2 at 41 (1998).

In short, Congress acted proleptically.

2. Exemptions

Another relevant aspect of Section 1201 is that it contains a plethora of exemptions. *See* Nimmer, *A Riff on Fair Use, supra*, at 692-702. Two relate to parental efforts to keep pornography from minors and the authority to disable cookies. 17 U.S.C. §§ 1201(h), 1201(i) (Supp. 2000) (essentially defining cookies as technological measures that "contain[] the capability of collecting or disseminating personally identifying information reflecting the online activities of a natural person seeking to gain access to the work protected"). The fascinating thing about both those features is that they address problems that were nonexistent at passage of the DMCA. Congress included them lest a need arise in the future.

The nonsensical nature of a law that allows parents to hack into a domain to express their desire to remain aloof from that domain has already been noted. *See* David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. COPYRIGHT SOC'Y 401, 409-12 (1999). As of passage of the DMCA, Congress noted, "[a] variety of tools available now allow parents to exercise control in a manner consistent with their own family values, of their children's access to online materials." S. REP. NO. 105-190, at 14 (1998). Use of those extant tools afforded ample protection to parents as of that date, without ensnaring them in liability under section 1201. So why on Urantia did Congress need to add a specific exemption to that section in this regard? Because it was concerned that "*in the future*, any of these tools [might] incorporate[] a part or component which circumvents a technological protection measure." *Id.* (emphasis added). To reiterate, it acted proleptically.

Likewise, commentary has noted the "topsy-turvy upshot" of the cookie-disabling exemption: "if a consumer receives disclosure about a cookie, then she may not disable it; if she does not receive disclosure, then she may lawfully disable." 3 NIMMER ON COPYRIGHT § 12A.05[B][2]. By all accounts, there was no extant reason as of adoption of the DMCA in 1998 to include such a provision. As stated by the legislative history, "[n]o specific example of such a privacy-invasive technology in use today that would be affected in this way has been called to the Committee's attention." S. REP. NO. 105-190, at 18. Even if such a threat did exist then, "all commercially significant browser programs can be readily configured to reject 'cookies,' and such a configuration raises no issue of any violation of section 1201." *Id*.

So why did Congress act here? The motivation here equally lay in the future: "because of the privacy concerns expressed that existing or *future technologies may evolve* in such a way that an individual would have to

circumvent a technological protection measure to protect his or her privacy, the committee concluded that it was prudent to rule out any scenario in which section 1201 might be relied upon to make it harder, rather than easier, to protect personal privacy on the Internet." *Id*. at 18 (emphasis added). Again, prolepsis reigned.

3. Future Assurances

One of the oddest features of the DMCA is that it contains a welter of corporation-specific features, relating to Macrovision Corp. 3 NIMMER ON COPYRIGHT § 12A.07[D][2]. The features in question relate to section 1201's controls on consumer analog devices. *See* 17 U.S.C. § 1201(k) (Supp. 2000). On that score, the House-Senate conferees acknowledged that numerous activities were underway in the "private sector to develop, test, and apply copy control technologies, particularly in the digital environment" and encouraged "their continuation, including the inter-industry meetings and working groups that are essential to their success." H.R. REP. NO. 105-796, at 68.

Unlike the features canvassed above, in which Congress enacted in 1998 whatever those inter-industry groups would develop in the future, the instant features unfolded differently. Congress declined to provide its advance imprimatur here, but instead foresaw that to the extent in the future "the participants request further Congressional action, the conferees expect that the Congress, and the committees involved in this Conference specifically, will consider whether additional statutory requirements are necessary and appropriate." *Id*. That reticence bespeaks a refusal to act proleptically. In this particular, therefore, it seems that a different sensibility was at work.

But before agreeing to this feature of the statute, the House-Senate "conferees assured themselves in relation to two critical issues." *Id*. One was that the analog copy control technologies that it adopted into law did not create "playability" problems on normal consumer electronics products. *See* 3 NIMMER ON COPYRIGHT § 12A.07[D][1][a]. The second is the one that implicates our current theme. The conferees assured themselves "that the intellectual property necessary for the operation of these technologies will be available on reasonable and nondiscriminatory terms." H.R. REP. NO. 105-796, at 68. On this score, the legislative history waxes at length:

> In relation to the intellectual property licensing issues, the owner of the analog copy control intellectual property—Macrovision Corporation—has written a letter to the Chairman of the Confer-

> ence Committee to provide the following assurances in relation to the licenses for intellectual property necessary to implement these analog copy control technologies: (1) that its intellectual property is generally available on reasonable and nondiscriminatory terms, as that phrase is used in normal industry parlance; (2) that manufacturers of the analog video cassette recorders that are required by this legislation to conform to these technologies will be provided royalty-free licenses for the use of its relevant intellectual property in any device that plays back packaged, prerecorded content, or that reads and responds to or generates or carries forward the elements of these technologies associated with such content; (3) in the same circumstances as described in (2), other manufacturers of devices that generate, carry forward, or read and respond to these technologies will be provided licenses carrying only modest fees (in the range of $25,000—in current dollars—initial payment and lesser amounts as recurring annual fees); (4) that manufacturers of other products, including set-top-boxes and devices that perform similar functions (including integrated devices containing such functionality), will receive licenses on reasonable and nondiscriminatory terms, including royalty terms and other considerations; and (5) that playability issues will not be the subject of license requirements but rather will be handled through an inter-industry forum that is being established for this purpose. The conferees emphasize the need for the technology's proprietor to adhere to these assurances in all future licensing.

Id. at 69. The sequel to those assurances is a fascinating historical chapter. Following the Mycterismus of 2050, all the assets of Macrovision wound up in a branch of the Berlusconi *famiglia* called Auxesis Parrhesia Enterprises ("APE"). APE promptly abandoned Macrovision's license fee, which in the interim had risen from $25,000 to $33,000, and announced that effective immediately it would charge $7,500,000.

The resulting suit ended up at the Supreme Judicature. Its decision concluded that, had Congress legislated a fee of $25,000 for Macrovision licenses, the resulting law would have been invalid as a Bill of Attainder. U.S. CONST. art. I, § 9, cl. 3; *see also Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977) (defining a bill of attainder as "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial[]"). It further noted that Congress cannot accomplish more through salting matters into reports than it could by enacting them into law directly. On that basis, the Court dismissed any claim against APE for violating Macrovision's representations to Congress.

As the Court noted, Congress itself had declared, almost contemporaneously with adopting the Digital Millennium Copyright Act, that "no voluntary commitment, however sincerely intentioned, can actually be enforced." S. REP. NO. 106-51, at 2 (1999) (Senate Commerce Committee report addressing satellite television). Had Congress truly wanted to sanctify Macrovision's representations into law, it knew how to do so; conversely stated, Congress knew exactly what it was *not* accomplishing whilst enunciating pious words about keeping license fees in the "modest" range.

B. Section 512

Another provision of the DMCA sets forth a safe harbor for the benefit of online service providers. In order to obtain eligibility under that feature, the provider must accommodate something that the statute denominates "standard technical measures." 17 U.S.C. § 512(i)(1)(B) (Supp. 2000); *see id.* § 114(d)(2)(C)(viii). What are those? Here, the statute affords some guidance: the reference is to "technical measures that are used by copyright owners to identify or protect copyrighted works." *Id.* § 512(i)(2). Inclusion of these "standard technical measures" reflects a belief "that technology is likely to be the solution to many of the issues facing copyright owners and service providers in this digital age." H.R. REP. NO. 105-551, at 61. This provision "is intended to encourage appropriate technological solutions to protect copyrighted works." *Id*. This provision, like the one governing section 1201's "technological measures," was also proleptic—in the sense that no "standard technical measures" existed as of enactment of the DMCA in 1998.

To qualify, future technical measures were required to be "developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process." 17 U.S.C. § 512(i)(2)(A) (Supp. 2000). "The Committee anticipate[d] that these provisions could be developed both in recognized open standards bodies or in ad hoc groups . . . ." H.R. REP. NO. 105-551, at 61. Many of the former bodies "ha[d] substantial experience with Internet issues." *Id*. at 62. The latter groups had been "successful in developing standards in other contexts, such as the process that has developed copy protection technology for use in connection with digital video disk players." *Id*.

In any event, the experience under this provision was disappointing. A pan-industry conclave convened in a plush Bosian resort in 2120. Although sixty percent of those gathered quickly hammered out an agreement, the remaining holdouts refused to accede. After extravagant blan-

dishments were proffered, another ten percent caved. But the remaining thirty percent would not budge.

So the industry decided to follow the majority standard. But a rogue element continued to operate outside those "standard technical measures." A lawsuit resulted. Petitioners claimed that the new operating guidelines constituted multi-industry standards, which appropriately reflected "a broad consensus of copyright owners and service providers." Respondents replied that seventy percent does not a consensus make.

In 2145, the Intermediate Decisors handed down their decision. The court noted that beyond urging "all of the affected parties expeditiously to commence voluntary, inter-industry discussions to agree upon and implement the best technological solutions available to achieve these goals," H.R. REP. NO. 105-551, at 61, Congress had legislated no teeth to see its precatory language through to completion. Based on the failure of a sizable minority to accede to the majority approach, no consensus was reached, and therefore no operative "standard technical measures" governed. To this date, that aspect of the statute remains a dead letter—with scant prospect that it will ever spring to life.

C. Section 1202

Another feature of the DMCA protects copyright management information ("CMI"). *See* 17 U.S.C. § 1202 (Supp. 2000). The statute defines eight distinct classes that qualify as CMI, including a work's title, author, and conditions for use. *Id*. § 1202(c)(1)-(8). The last enumerated category specifies "[s]uch other information as the Register of Copyrights may prescribe by regulation . . . ." *Id*. § 1202(c)(8).

That feature also bears some future-oriented tendencies, insofar as a party had no way, as of passage of the DMCA in 1998, to know what category of information might become defined as CMI in 2316, for example. Is it for that reason proleptic?

Without question, the cited provision involves delegation of quasi-lawmaking authority to a government official outside of Congress. By itself, however, that delegation represents no innovation, even within U.S. copyright law. For instance, when Congress passed the Audio Home Recording Act, Pub. L. No. 102-563, 106 Stat. 4238 (Oct. 28, 1992), it authorized the Secretary of Commerce to establish by regulation the scope of a "professional model product" exempt from regulation thereunder. 17 U.S.C. § 1001(10) (1994); *see also* 2 NIMMER ON COPYRIGHT § 8B.02[A][2]. Even more directly, the antecedent statute authorized the Register of Copyrights "to establish regulations not inconsistent with law" for various purposes. 17 U.S.C. § 702 (1994); *see also id.* §§ 119(b)(1)

(directing satellite carriers whose secondary transmissions have been subject to compulsory licensing to deposit statement of account with Register of Copyrights "in accordance with requirements that the Register shall prescribe by regulation"); *id.* 104A(e)(1)(D)(i) (authorizing the Copyright Office to issue "regulations governing the filing under this subsection of notices of intent to enforce a restored copyright.").

But the instant section 1202 differs in kind from its predecessors. Those previous features of law enacted a policy desired by Congress, for instance to require libraries to prominently display a copyright warning adjacent to their photocopying machines. *Id.* § 108(d)(2). The details of the warning's verbiage were simply left to the Copyright Office to promulgate. *Id*.

Reverting to section 1202, by contrast, something basically different was at work. Consider that in the previously cited examples, Congress made the decision that satellite carriers would need to pay for secondary transmissions and foreigners wishing to resurrect their lapsed copyrights would need to file a notice of intent; it was simply the ministerial details of how to accomplish those goals that Congress left to the Register of Copyrights. *See* 17 U.S.C. §§ 119(b)(1), 104A(e)(1)(D)(i) (Supp. 2000). By contrast, the open-ended language in Section 1202 of the DMCA became a blank check.

The matter in question unfolded in litigation in 2098, when the Register of Copyrights used the authority vested in her by section 1202(c)(8) to prescribe by regulation the categorical requirement to include as part of CMI the name of the "director who is credited in the TV broadcast of an audiovisual work." The resulting litigation challenged that regulation, on the basis that Congress had already defined one category of CMI as follows: "*[w]ith the exception of public performances of works by radio and television broadcast stations*, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work." *Id.* § 1202(c)(5) (emphasis added). The complainant aptly noted that the categorical regulation effectively wrote out of the statute the italicized preamble to that category.

In response, the Register adjured, "[s]o what authority do you think Congress gave me to prescribe by regulation, huh? The statutory categories already include the work's title, author, copyright proprietor, *etc*. Am I expected to add the name of the author's mothers-in-law? Based on intervening technological advances, notably the death of the Intrenaut, it is only sensible now to expand the reach of directorial credit for audiovisual works to broadcast TV—which, as we all know, is poles apart from what the late 20th Century understood by that term." The court bought the ar-

gument. As a result, the DMCA applied to seven categories for its first century, and in addition to an eighth thereafter.

So it seems that section 1202's authorization for regulation produced a much greater upset to received expectation than all of its predecessors. Indeed, Congress legislated against the grain when it passed the DMCA. As mentioned earlier, the Audio Home Recording Act contained an authorization for the Secretary of Commerce to propound limited regulations. The original bill for that 1992 legislation would have gone much further. That version contemplated that the Secretary of Commerce would have the power to amend the basic standards regarding permissible copying, as the technology progressed. S. REP. NO. 102-294, at 23 (1992). Nonetheless, Congress ultimately deleted that authority, feeling that "this issue raises policy questions that are appropriately addressed in the future by Congress." H.R. REP. NO. 102-873 pt. 1, at 14 (1992); *see also* 2 NIMMER ON COPYRIGHT § 8B.03[B][1].

The value judgment that Congress expressed in the Audio Home Recording Act seems to have gone out the window by the time that Congress passed the DMCA—what it felt in 1992 "raised policy questions that are appropriately addressed in the future by Congress" became by 1998 the subject for present-implementation-via-the-future. In this facet as well, the DMCA evinced proleptic tendencies.

D. Distinction from Past Legal Schemes

It can be answered that it is anything but abnormal for the laws of Congress to enshrine a legislative approach today, based on past experience, to govern in the future. In some sense, the very constitutional purpose of copyright—"to promote the progress of science"—is future-oriented. Some particulars follow:

- In the Audio Home Recording Act of 1992, Congress regulated "digital audio recording devices." 17 U.S.C. § 1001(3) (1994). When the first case arose under that law six years later, the technology had greatly progressed, making it very difficult to predict whether a hand-held device used to play MP3 files fell within the regulation of the statute. *See Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999).

- Congress in the past had relied on industry to work out solutions. An example is the Berne Convention Implementation Act of 1988, Pub. L. 100-568, 102 Stat. 2853 (Oct. 31, 1988), which Congress passed ten years before the DMCA to make U.S. law compliant with the Berne Convention. That law jettisoned the compulsory li-

cense for juke boxes, and substituted an interim statutory royalty, with concomitant incentives for industry to come up with their own alternative consensual scheme. *See* 2 NIMMER ON COPYRIGHT § 8.17[A]. Because that amendment itself provided that Congress's scheme would lapse into desuetude once the affected industries reached agreement, the result is that a law passed in 1988 exerted no more impact following an industry agreement in 1992.

- Over the decades, such performing rights societies as ASCAP and BMI have made themselves integral to the sound functioning of the copyright system. *See* Robert Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1328-40 (1996). Even under pre-DMCA law, entities that wished to use music had no other option than to take out appropriate licenses from those entities. *See* S. REP. NO. 104-315, at 35 (1996) (minority views of Sen. Hank Brown, Member, Senate Comm. on the Judiciary) ("[U]nder the current system, it is impossible to choose only one: virtually anyone who chooses to play music in public will have to purchase a license from two, if not three music licensing organizations."). Those consortia therefore furnish a template for the pan-industry conferences that Congress contemplated when enacting the DMCA.

Because these examples nominally indicate that future-directed regulation, even to the extent of deferring to industry practice, is nothing new, that rebuttal concludes that the DMCA fits harmoniously into past schemes. But it is not so. To demonstrate, I must myself engage in the device of *prolepsis*—defined in rhetoric to mean answering an opponent's anticipated objections. LANHAM, *supra*, at 120. The examples just posited actually do not debunk my greater thesis.

Consider first the performing rights societies. One outstanding feature that pertains to them is that they obtain only non-exclusive rights from their member-composers. *See* 2 NIMMER ON COPYRIGHT § 8.19[A]. As a consequence, a party who wishes to exploit a given song always has the option (I am speaking now of pre-1998 law, continuing through the present) of ignoring ASCAP and BMI, instead dealing directly with the subject composer. Conversely, a composer retains the option of declining to join any performing rights society, and can choose instead to personally police all exploitation of her work. If she finds her works exploited by a television station—even one that has punctiliously maintained valid ASCAP and BMI licenses—she will prevail in an infringement suit. Those considerations debunk any notion that these societies, as a legal matter, imposed their will on nonconsenting members of the affected class.

Next comes the Berne Convention Implementation Act of 1988. In that amendment, parties could opt out of the statutory rates by mutual agreement. But the law did not bind nonagreeing parties! *See* 2 NIMMER ON COPYRIGHT § 8.17[C]. Thus, the innovation of the DMCA remains—it alone among Congress's amendments to the Copyright Act subjects even nonagreeing parties to the strictures of industry agreements, and conveys on those agreements the force of law.

Moving to the Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4238 (Oct. 28, 1992), it is true that even a visionary at passage of that Act would have had a hard time knowing how a Diamond Rio, to be developed years later, would fall within its framework. The difference, though, is that the DMCA beggars even those efforts. It was not merely difficult, but impossible, for someone at enactment of that law to predict its operation. Even imagining that someone was farsighted enough in 1998 to envision the development of Havona Servitals in 2600, the prophet still would have had no inkling as to their permissibility, absent further clairvoyance regarding industry standards to be developed in 2655.

The DMCA pursued a course radically different from previous enactments—it set forth a framework that Congress expected to be filled in through future conduct of the affected parties. In other words, the expectation at enactment was not simply that courts called upon to construe the statute would give concrete substance to the law's interstices. That phenomenon is universally applicable, as Publius noted long ago. *See* THE FEDERALIST No. 37, at 229 (James Madison) (Clinton Rossitor, ed. 1961) ("All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."). Nor was it a prediction that Congress's laws today would spark desirable conduct in the future—that, too, is implicit in any enactment designed "to promote the progress of science," as all copyright amendments constitutionally must be.

Instead, the distinctive feature of the DMCA was its expectation that future agreements among the affected parties would, in effect, gain the force of law. We have here a textbook example of a law being unclear not because of insufficient care in drafting or the failure of legislators to hammer out agreement; instead, the law itself was drafted in advance of the problems to be encountered in its application. *See* Jane Kaufman Winn, *Open Systems, Free Markets, and Regulation of Internet Commerce*, 72 TUL. L. REV. 1177, 1253 (1998); Jack Schwartz & Amanda

Stakem Conn, *The Court of Appeals at the Cocktail Party: The Use and Misuse of Legislative History*, 54 MD. L. REV. 432, 435-36 (1995).

It takes little effort to uncover the fatal flaw in that methodology. Consider that the primary issue on Congress's agenda when deliberating the DMCA was the putative threat of a "pay-per-use" future. *See* Nimmer, *A Riff on Fair Use, supra,* at 717-19. To safeguard against that threat, Congress incorporated numerous features into the statute. One authorized the Copyright Office to promulgate rules releasing adversely affected users from the anti-circumvention bans that it otherwise imposed. *See* 17 U.S.C. § 1201(a)(1)(C) (Supp. 2000).

But already by 2000, the Copyright Office recognized how unwieldy was the task that the DMCA assigned to it. It complained that "the Commerce Committee Report does not state how future adverse impacts are to be evaluated." Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64555, 64559 (Oct. 27, 2000). It further quoted a leading proponent of exemptions as admitting that "the inquiry into whether users of copyrighted works are likely to be adversely effected by the full implementation of section 1201(a)(1) is necessarily 'speculative since it entails a prediction about the future.'" *Id*. at 64562-63 (quoting Peter Jaszi).

From the oracle at Delphi to last year's Andromeda Spectacle, no one has succeeded in reducing predictions of the future into a science. Enactment of the DMCA in 1998 has proven no exception to that rule.

III. APPLICATION TO FACTS OF THIS CASE

The history of copyright law is inextricably linked to the history of technology. Emblematic of the tension that arises here is the celebrated judgment of 2222 involving the oneirographlogisticon. That device, which for the first time allowed users to record the dreams of others, raised a host of copyright issues. Pitted on one side were the dreamers, who claimed to have originated the material at issue. Not so, responded the auditors—dreams, as is well known, emanate from across the noetic divide, so that the dreamers at issue cannot claim personal originality; moreover, the necessary ingredient of fixation in a tangible medium of expression comes from the auditor, not the dreamer, further depriving the latter of any copyright interest.

Happily, the case at bar raises problems a bit less metaphysical than those at issue in the oneirographlogisticon litigation. But the theme remains constant: technological advancements require ceaseless refinement of copyright doctrine.

A. Petitioner's Motion for Summary Judgment

Petitioner's argument at bar is extremely simple: the law forbids manufacturers from allowing users to "circumvent a technological measure that effectively controls access to a work;" recently, the Saturnine Standards Society has promulgated the requisite technological measures applicable to Havona Servitals; respondent manufactures Havona Servitals that do not comply with the stated measures. Hence, petitioner urges, we should grant summary judgment on its behalf.

At the current stage of factual development, I am left with certain questions. Why, if the Saturnine Standards Society truly represents an industry consensus, are respondent's devices outside its standards? Did respondent manufacture the subject Havona Servitals before the Society promulgated its standards, and if so, is there a "grandfather provision" under which it finds shelter. Until those questions are answered, I must withhold the requested grant of summary judgment.

B. Respondent's Motion for Summary Judgment

Respondent urges multiple objections to being forced to adopt the technology at issue. It, in its turn, seeks summary judgment on numerous bases.

1. Constitutionality

The first challenge to the DMCA is of constitutional magnitude. Respondent urges that the device of proleptic legislation as implemented via the DMCA violates the nondelegation principle implicit in that instrument.

To consider this challenge, it is useful to start with an opinion of the Supreme Court of the United States (as the High Tribunal was then known) regarding proleptic legislation. The case in question challenged the constitutionality of the Bituminous Coal Conservation Act of 1935. *Carter v. Carter Coal Co.*, 298 U.S. 238, 278 (1936). A part of that act "delegates the power to fix maximum hours of labor" to a commission composed of representatives of both sides, *i.e.*, "producers of more than two-thirds of the annual national tonnage production for the preceding calendar year," on the one hand, and unions representing "more than one-half of the mine workers employed," on the other. *Id.* at 310. The standards reached by that commission were to be binding not only on its own members, but also on dissenting companies. The Court evaluated that device in the following language:

> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative

> delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. The record shows that the conditions of competition differ among the various localities. In some, coal dealers compete among themselves. In other localities, they also compete with the mechanical production of electrical energy and of natural gas. Some coal producers favor the code; others oppose it; and the record clearly indicates that this diversity of view arises from their conflicting and even antagonistic interests. The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safegu[a]rded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.

Id. at 311. Based on that early decision, it would seem that the type of delegation in which the DMCA engages cannot withstand scrutiny. "Congress may not constitutionally delegate its legislative power to another branch of Government." *Touby v. United States*, 500 U.S. 160, 165 (1991). It would seem, a fortiori, that it may not delegate its lawmaking role to a nongovernmental body such as the amorphous standards-setting consortium envisioned by the DMCA. *Demko v. United States*, 216 F.3d 1049, 1054 (Fed. Cir. 2000) (upholding law because "Congress has provided sufficient boundaries to the ATF's authority").

Yet that very "delegation doctrine" has been reserved for what Judge Leventhal terms "the extremist instance." *Amalgamated Meat Cutters and Butcher Workmen of N. Am., AFL-CIO v. Connally*, 337 F. Supp. 737, 762 (D.D.C. 1971). It has been invoked on only the rarest of occasions. *See* Bernard W. Bell, *R-e-s-p-e-c-t: Respecting Legislative Judgments in Interpretive Theory*, 78 N.C. L. REV. 1254, 1308 (2000) (canvassing literature on nondelegation doctrine); David McGowan & Mark A. Lemley*, Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL'Y 293, 343-56 (1994) (examining parallel antitrust doctrine of state action). In 2001, for instance, the Supreme Court upheld delegation to the Environmental Protection Agency of

standards "for a discrete set of pollutants and based on published air quality criteria that reflect the latest scientific knowledge, [by which the] EPA must establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air." *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 121 S. Ct. 903, 912 (2001) (internal quotation marks omitted).

The question arises as to how the DMCA stacks up against that delegation. As set forth above, the law itself bars circumventing "a technological measure that effectively controls access to a work," 17 U.S.C. § 1201(a)(1)(A) (Supp. 2000), and Congress expressed the hope that "technological measures will most often be developed through consultative, private sector efforts." H.R. REP. NO. 105-796, at 64 (1998). Did Congress cabin those private sector efforts, say, as much as it did the activities of the EPA approved by the Court way back in 2001? Absolutely not. In fact, beyond praising 1996-vintage "multi-industry efforts to develop copy control technologies," it offered no guidance whatsoever here. *See* H.R. REP. NO. 105-551, pt. 2 at 41 (1998). Previous laws have survived because the lawmaker "has exercised sufficient independent judgment and control so that the details . . . have been established as a product of deliberate state intervention, not simply by agreement among private parties." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634-35 (1992). Yet that very defect characterizes the DMCA.

In sum, we have here "delegation running riot." *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring). It would therefore seem that the DMCA might serve as the successor to the 1935-era decisions overruled by the Court as in conflict with the nondelegation doctrine. Were I writing on a blank slate, I might indeed strike down the DMCA on constitutional grounds.

But enough! Ever since the Great Chiasmus of 2313, as is well known, the role of courts has been to offer advisory opinions of a policy nature, rather than to adjudicate the lawfulness of enactments. *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1031 (2001) (quoting speaker on June 4, 1787, objecting with the quaint notion that "It was quite foreign from the nature of ye. Office to make them judges of the policy of public measures."). Accordingly, this court is without power to comment further on the seeming constitutional infirmities of the DMCA.

2. Advisability

In the foregoing spirit, this court limits itself to commenting on how advisable it might have been for Congress to adopt this provision in 1998. Already, the contemporary testimony given to Congress cast doubt on the wisdom of this provision:

> [S]uch an obligation is unreasonably onerous because hardware and software designers would be under an open-ended obligation to comply with any present or future technological marking, alteration, or distortion technology applied to any analog or digital signal. Such technologies might be technically unreasonable, inefficient, costly and unfair to consumers.

WIPO Copyright Treaties Implementation Act, Hearing Before the Subcomm. on Telecommunications, Trade, and Consumer Protection, supra, at 23 (statement of Seth Greenstein, on behalf of the Digital Media Association). Given those concerns, the question therefore arises: did Congress pass the DMCA against a background of parallel successes? In other words, had adverse parties often banded together before 1998 to implement Congressional directives, such that Congress had every confidence that they would do so again? Historical digging dispels that suspicion.

A few years before the adoption of the DMCA in 1998, Congress had passed copyright amendments designed to accommodate satellite technology. At that 1994 juncture, Congress relied on the parties to fill in the law's interstices. The Copyright Office produced a study, shortly before Congress passed the DMCA, commenting about the success of that methodology:

> Although the terms and conditions for conducting the measurements [of signal intensity] were not put in the statute, both broadcasters and satellite carriers promised Congress at the passage of the 1994 Satellite Home Viewer Act that they would privately negotiate the terms and conditions. They never did.

U.S. COPYRIGHT OFFICE, A REVIEW OF THE COPYRIGHT LICENSING REGIMES COVERING RETRANSMISSION OF BROADCAST SIGNALS 122-23 (1997). That baleful history formed the backdrop against which Congress passed the DMCA. Simply stated, the relevant parties from across divergent industries had never in the past agreed on the terms of extra-legislative decrees. There was no prospect as of 1998 that they would do so in the future. Subsequent events have only borne out the inexorability of what a sage observer would have predicted as of 1998—it took six centuries for these efforts to reach fruition!

Another problem with relying on industry to promulgate standards for technological measures was that of mutual incompatibility. One speaker posited that some copyright proprietors might in the future adopt measures that, as a technical matter, are directly inconsistent with other measures adopted by other proprietors. It would be technically infeasible under those circumstances "for a manufacturer to design a product that responds to or implements all such measures." *WIPO Copyright Treaties Implementation Act, Hearing Before the Subcomm. on Telecommunications, Trade, and Consumer Protection*, *supra*, at 23 (statement of Seth Greenstein). At bar, respondent maintains that they fall prey to precisely that predicament—it claims not to be able to comply with the technical measures promulgated by the Saturnine Standards Society without falling afield of the 2187 Decree of the Jovial Koinonia. Further investigation is required on this score. The court will appoint a special master from the Green Race to investigate that particular danger.

Respondents further maintain that even if that hurdle is vaulted, the danger of enforcing standards promulgated by the Saturnine Standards Society is that they "will freeze technology." *Id.* at 24. Certainly, the history of technology as applied to copyright is replete with numerous horror stories as to how various "advances" have in fact represented setbacks. *Cf.* Margaret Chon, *New Wine Bursting from Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV. 257, 261 (1996) (effectuating the "delete" command in the computer environment in order to avoid copyright infringement actually creates a new copy in an additional register, thereby implicating the owner's rights). The Green Master is admonished to sniff out parallel dangers in the instant context.

DECREE

Based on the foregoing, it is hereby ORDERED, ADJUDGED, and COMMANDED that:

- The parties will brief, within a fortnight of today's date, the question of whether the edicts of the Saturnine Standards Society truly represent an industry consensus by producing statistics showing exactly what percentage of manufacturers of which devices have subscribed to those standards;

- Such briefing shall also address when respondent began manufacture of its Havona Servitals vis-à-vis pronouncement of the edicts of the Saturnine Standards Society, and if so whether a grandfather ruling should protect respondent;

- Such briefing shall, in addition, address the conundrum whether, to the extent that respondent has manufactured devices outside those standards, and without benefit of any grandfather clause, and assuming that respondent's sales occupy a substantial portion of the market, it no longer can be the case that the edicts of the Saturnine Standards Society represent "technological measures . . . that effectively controls access to a work" with the imprimatur of a consensus of "multi-industry efforts."

- The Green Master shall report to the court regarding the matters outlined above (mutual incompatibility, freezing technology, k.t.l.) within one month of today's date.

- The final matter left dangling is the constitutionality of the DMCA under the nondelegation doctrine discussed above. I must relegate that determination to the traditional forum of talk radio shows. In light of the extraordinary interest that this issue has garnered, I am taking the unprecedented step of ordering a full four (4) Monday afternoons be granted to this topic. The results should be duly forwarded to the Great Commissioner.

- All parties to this action are again admonished not to activate their oneirographlogisticons until conclusion of the case.