CONGRESS SHOULD AMEND THE COPYRIGHT ACT TO PROTECT TRANSACTIONAL WATERMARKS

By Matt Williams[†]

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I. INTRODUCTION

Congress passed the Digital Millennium Copyright Act ("DMCA")[1] in 1998 "to encourage new ways of disseminating works in the digital era"[2] by providing copyright owners with new legal mechanisms to prevent online infringement.[3] Although the DMCA's prohibitions regarding the circumvention of technological protection measures ("TPMs")[4] have thus far succeeded in the former statutory objective,[5] they have proven less than adequate in the latter.[6] Despite the proliferation of lawful online services that provide consumers with access to copyrighted material, copyright infringement is still rampant online. This is especially true in the context of peer-to-peer ("p2p") networks, where infringements of sound recordings

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1. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) [hereinafter DMCA].

2. Marybeth Peters, Register of Copyrights, Copyright Enters the Public Domain, The 33rd Donald C. Brace Memorial Lecture Delivered at New York University School of Law (Apr. 29, 2004), *in* 51 J. COPYRIGHT SOC'Y U.S.A. 701, 722 (2004).

3. *See* Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1618 (2001) (explaining that copyright holders "persuaded Congress that it could foster participation in digital communication only by reinforcing copyright owners' control over the distribution of their works").

4. This article will use the term "TPM" to refer to technological protection measures currently protected by section 1201 of title 17, including technological measures that effectively control access to works and technological measures that effectively protect rights of copyright owners. "[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)(B) (2000). "[A] technological measure 'effectively protects a right of a copyright owner. . . .' if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner. . . ." *Id.* § 1201(b)(2)(B). This article will use the term "DRM" to refer to all kinds of technologies used by copyright owners to protect their rights in digital copies of works, including technologies that are not protected by section 1201.

5. *See* June M. Besek, *Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts*, 27 COLUM. J.L. & ARTS 385, 496 (2004) (finding that "[s]ection 1201 has been successful in stimulating new means of distribution and promoting consumer choices with respect to a variety of works, particularly sound recordings, motion pictures and television programming, and literary works"); Peters, *supra* note 2, at 722; *see also* 17 U.S.C. § 1201 (codifying prohibitions).

6. *See generally* Fred von Lohmann, *Measuring the Digital Millennium Copyright Act Against the Darknet: Implications for the Regulation of Technological Protection Measures*, 24 LOY. L.A. ENT. L. REV. 635 (2004).

still occur in large numbers.[7] Legislative action is needed to address this problem.

Although legal protection for TPMs has not prevented this widespread infringement, it has frustrated consumers, technologists, and academics who feel that TPMs prevent them from engaging in noninfringing uses of works.[8] Evidence indicates that the impact of TPMs on noninfringing uses is slight.[9] In addition, many of the types of "personal copying" that consumers believe to be noninfringing, do not necessarily qualify as fair use.[10] Nevertheless, the major record labels have decided to begin selling

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7. INT'L FED'N OF THE PHONOGRAPHIC INDUS., IFPI DIGITAL MUSIC REPORT 2008: REVOLUTION, INNOVATION, RESPONSIBILITY 18 (2008), *available at* http://www.ifpi.org/content/library/DMR2008.pdf ("Tens of billions of illegal music files are traded annually worldwide at an estimated ratio of 20 illegal downloads for every track sold. This has had a major impact on the development of legal services, holding back growth in the whole digital sector.").

8. *See, e.g.*, Deirdre K. Mulligan & Aaron K. Perzanowski, *The Magnificence of the Disaster: Reconstructing the Sony BMG Rootkit Incident*, 22 BERKELEY TECH. L.J. 1157, 1185 (2007) ("The constraints imposed by DRM generally reduce the value to consumers of protected content."); Pamela Samuelson & Jason Schultz, *Should Copyright Owners Have to Give Notice of Their Use of Technical Protection Measures?*, 6 J. TELECOMM. & HIGH TECH. L. 41, 42 (2007) ("TPMs may inhibit playful and creative uses of digital works and other non-infringing uses of the content, such as time- or platform-shifting."); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 519 (1999) ("Either Congress or the courts will be forced to constrain the reach of the anti-device rules so as not to undermine Congressional intent to preserve fair uses and so as not to harm competition and innovation in the information technology sector.").

9. *See* Peters, *supra* note 2, at 723 (explaining that rulemakings regarding DMCA have shown that "by and large technological measures ha[ve] not been used in a heavy-handed or inappropriate way"); Jane C. Ginsburg, *Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience*, 29 COLUM. J.L. & ARTS 11, 12 (2005) ("The US experience to date indicates that legal protection for technological measures has helped foster new business models that make works available to the public at a variety of price points and enjoyment options, without engendering the 'digital lockup' and other copyright owner abuses that many had feared.").

10. *See* Sydney Aaron Beckman, *From CD to MP3: Compression in the New Age of Technology Overlooked Infringement or Fair Use?*, 42 GONZ. L. REV. 469, 499 (2007) ("The application of Shape-Shifting to music CD's owned by individuals is an infringing use which violates the United States Copyright Act."); Memorandum from Marybeth Peters, Register of Copyrights, Recommendation of the Register of Copyrights in RM 2002-4; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, to James H. Billington, Librarian of Cong. 130 (Oct. 27, 2003), *available at* http://www.copyright.gov/1201/docs/registers-recommendation.pdf ("[N]o court has held that 'space-shifting' is a fair use."); Wendy M. Pollack, Note, *Tuning In: The Future of Copyright Protection for Online Music in the*

songs online without TPMs in order to accommodate the wishes of their customers.[11]

This is good news for consumers, who will be able to move their music libraries from device to device and enjoy their favorite songs on-the-go. It is also good news for artists that transform[12] works by sampling them or creating mash-ups.[13] However, all indications are that the labels plan to continue to utilize filtering and watermarking to protect their rights online.[14] Whereas filtering involves screening databases of protected material that has been "fingerprinted" against online content to spot infringement and then remove or block infringing material, watermarking involves embedding information that identifies a copyright owner, relevant terms of use and/or a purchaser of a copy in copies of works.[15]

Digital Millennium, 68 FORDHAM L. REV. 2445, 2482 (2000) ("[S]imply because a use is private does not necessarily make it fair.").

11. *See generally* Monika Roth, Note, *Entering the DRM-Free Zone: An Intellectual Property and Antitrust Analysis of the Online Music Industry*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 515 (2008); Press Release, EMI Group, EMI Music Launches DRM-Free Superior Sound Quality Downloads Across Its Entire Digital Repertoire (Apr. 2, 2007), *available at* http://www.emigroup.com/Press/2007/press18.htm; Jeff Leeds, *Universal Music to Sell Some Music Without the Copy Protection*, N.Y. TIMES, Aug. 10, 2007, at C6; Caroline McCarthy, *Sony BMG Signs on to Amazon's DRM Free Music Store*, CNET NEWS.COM, Jan. 10, 2008, http://www.news.com/8301-10784_3-9848258-7.html; Ken Fisher, *Music DRM in Critical Condition: Universal Tests DRM Free Music Sales*, ARS TECHNICA, Aug. 9, 2007, http://arstechnica.com/news.ars/post/20070809-music-drm-in-critical-condition-universal-tests-drm-free-music-sales.html.

12. For a discussion of the meaning of the term "transformative," see Matt Williams, *Recent Second Circuit Opinions Indicate That Google's Library Project Is Not Transformative*, 25 CARDOZO ARTS & ENT. L.J. 303, 305 (2007) [hereinafter Williams, *Transformative*] (arguing that a transformative use involves "the creation of original expression that contains commentary").

13. *See* Pat Aufderheide & Peter Jaszi, Am. Univ. Ctr. for Soc. Media, Recut, Reframe, Recycle: Quoting Copyrighted Material in User-Generated Video, at 7 (2008), *available at* http://www.centerforsocialmedia.org/files/pdf/CSM_ Recut_Reframe _Recycle_report.pdf (describing mash-up videos posted to online websites); Noah Shachtman, *Copyright Enters a Gray Area*, Wired, Feb. 14, 2004, *available at* http://www.wired.com/entertainment/music/news/2004/02/62276 (describing mash-up album that combined music from the Beatles' *White Album* with Jay-Z lyrics).

14. *See* David Kravets, *DRM Is Dead, But Watermarks Rise From Its Ashes*, WIRED, Jan. 11, 2008, *available at* http://www.wired.com/print/entertainment/music/news/2008 /01/sony_music; Bill Rosenblatt, *Music Industry Accelerating Watermarking Adoption*, DRM WATCH, Aug. 16, 2007 [hereinafter Rosenblatt*, Accelerating*], http://www. drmwatch.com/drmtech/article.php/3694781; Bill Rosenblatt, *New Market Study Predicts Growth in Watermarking and Fingerprinting Markets*, DRM WATCH, Jan. 24, 2008, http://www.drmwatch.com/watermarking/article.php/3723626.

15. Bill Rosenblatt of DRM Watch has articulated the distinction between watermarks and filtering technologies that rely on fingerprinting:

A debate regarding the efficacy and benefits of filtering is already well underway among interested parties[16] and in the courts.[17] While some hope that filtering will help save the music industry from the ongoing reduction in sales partly caused by infringement, others fear that it will deprive us of myriad noninfringing uses.[18] With much of the copyright community's focus on filtering, watermarking has thus far received less attention from policy-minded advocates.

Watermarking has the potential to benefit consumers and copyright owners by allowing consumers to engage in personal and transformative copying while at the same time enabling copyright owners to police infringement on peer-to-peer networks.[19] This is especially true of "transactional watermarking" that imprints information about the consumer who purchases songs on the digital files delivered by online music services.[20]

> Watermarking and fingerprinting are two forms of technology known generically as *content identification*. Watermarking works by embedding data into digital images, audio, or video in such a way that the data is very difficult to remove and the effect on a user's perception of the content is (usually) nonexistent. The data embedded in a watermark is often the identity of the content, though it could also include the identity of a user or device that downloaded it, or of a retailer that sold it. Fingerprinting is a set of techniques for analyzing content, reducing its unique characteristics to a set of one or more numbers that serve as 'fingerprints,' and looking those fingerprints up in a database to determine the identity of the content.

Bill Rosenblatt, *New DRM Watch Section on Watermarking and Fingerprinting*, DRM WATCH, Oct. 24, 2007, http://www.drmwatch.com/watermarking/article.php/3706996; *see also* Dean L. Fanelli et al., *2007 Patent Law Decisions of the Federal Circuit*, 57 AM. U. L. REV. 821, 914 (2008) ("[A] 'watermark' is data embedded into audio, video, or image signals, or data files to identify a source or copyright status of the signals or data files.").

16. *Compare* Principles for User Generated Content Services, http://www.ugcprinciples.com/ (last visited Sept. 12, 2008) ("UGC Services should use effective content identification technology . . .with the goal of eliminating from their services all infringing user-uploaded audio and video content . . ."), *with* Fair Use Principles for User Generated Video Content, http://www.eff.org/issues/ip-and-free-speech/fair-use-principles-usergen (last visited Sept. 12, 2008) ("Human creators should be afforded the opportunity to dispute the conclusions of automated filters.").

17. *See, e.g.*, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 518 F. Supp. 2d 1197 (C.D. Cal. 2007) (issuing injunction including filtering mandate regarding p2p service).

18. *See* Alexandra Berzon, *Filtering Fair Use?*, RED HERRING, Mar. 4, 2007, http://www.redherring.com/Home/21516.

19. *See* Eliot Van Buskirk, *Are Digital Music Watermarks a Blessing or a Curse?*, WIRED, Aug. 20, 2007, http://www.wired.com/entertainment/music/commentary/listeningpost/2007/08/listening post_0820.

20. *See* Rosenblatt, *Accelerating*, *supra* note 14.

Such watermarks could, as the technology improves, allow a copyright owner to determine who is making copies of sound recordings available on p2p networks in a much more specific manner than the current techniques used by record labels.[21] The presence of a transactional watermark identifying the original purchaser of the file would provide evidence pointing to the source of the infringing copy. This could facilitate more effective enforcement of rights in court because record labels could prove that a particular copy of a song purchased by a specific consumer was the original source of a downloaded copy available in another p2p user's folder of shared files.[22] In addition, a private system of curbing infringers' Internet access may develop that penalizes Internet users who distribute copies of purchased songs.[23]

Commentators and policy makers have seen the potential in watermarks for some time.[24] Unfortunately, the statutory section that Congress

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21. *See id.*

22. Just before this Article went to press, the Recording Industry Association of America ("RIAA") announced that it plans to scale back lawsuits against individual p2p infringers and pursue agreements with Internet access providers pursuant to which infringers could have their Internet access terminated after repeated warnings regarding infringement. *See* Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008. Nevertheless, watermarks can provide evidence of direct infringement in suits involving allegations of secondary liability and can also provide record labels and Internet access providers with more concrete evidence of p2p infringement.

23. France, Japan and the UK are considering policies that would threaten Internet users with loss of access for repeated infringements, but such proposals have received considerable criticism. *See* Posting of Danny O'Brien to EFF Deeplinks Blog, Three Strikes, Three Countries: France, Japan, and Sweden, http://www.eff.org/deeplinks/2008/03/three-strikes-three-countries (Mar. 18, 2008); Posting of Sherwin Siy to Public Knowledge Policy Blog, Banned from Life: Why Copyright Shouldn't Control Online Connectivity, http://www.publicknowledge.org/node/1416 (Feb. 27, 2008 11:48 EST); *see also* Susan P. Crawford, *The Internet and the Project of Communications Law*, 55 UCLA L. REV. 359, 360 (2007) ("[A]ccess [to the Internet] is nearly as necessary as oxygen."). This article is not proposing such legislative action. However, there may be a way for copyright owners and online music service providers to reach reasonable agreements regarding terminating the accounts of repeat infringers.

24. For example, Jonathan Band has argued that:

> A prohibition on tampering with copyright management information obviously benefits the copyright owner because it helps ensure that users receive accurate information about the terms and conditions governing the use of the work. At the same time, preserving the integrity of CMI also helps consumers by reducing counterfeiting and misrepresentations by middlemen concerning the contents of a digital envelope.

Jonathan Band, *The Digital Millennium Copyright Act: A Balanced Result*, 1999 STAN. TECH. L. REV. 12, 12 (1999).

created in the DMCA to protect "copyright management information" ("CMI") such as watermarks, 17 U.S.C. § 1202, likely fails to prohibit circumvention of transactional watermarks for the purpose of removing information about the user (in this case, the purchaser) of a work. The statute explicitly excludes from the definition of CMI "any personally identifying information about a user of a work or of a copy" and prohibits the Register of Copyrights from prescribing any regulation that would amend the definition of CMI to include "any information concerning the user of a copyrighted work."[25] These limitations on the protection of CMI were inserted in order to protect against a perceived threat to privacy.[26] However, recent studies indicate that transactional watermarks can be utilized without significantly undermining privacy interests.[27]

Shortly after the DMCA was signed into law, Senator Orrin Hatch, who was the Chairman of the Senate Judiciary Committee, wrote:

> Because new technology is constantly changing, it is difficult to legislate intelligently. We want to be on the cutting edge, but not the *bleeding* edge of new technology. Therefore, some useful principles for judging what to do in the case of "high tech" issues are: (1) to refrain from legislation unless it is really necessary; (2) to address only those problems that have already identified themselves or that can be seen on the horizon; and (3) to make sure that technology is free to develop in any direction.[28]

Given that p2p networks were relatively obscure when the DMCA was enacted,[29] it made sense for Congress to limit the scope of the definition

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Similarly, Senator Orrin Hatch has argued that CMI "should make it easier for the Internet's electronic marketplace to function and self-regulate." *See* Orrin G. Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. PITT. L. REV. 719, 756 (1998).

25. 17 U.S.C. § 1202 (2000).

26. *See* Staff of the H. Comm. on the Judiciary, 105th Cong., Section-by-Section Analysis of H.R. 2281 As Passed By the United States House of Representatives 34 (Comm. Print 1998) [hereinafter House Manager's Report], *reprinted in* 46 J. Copyright Soc'y 635, 653 (1999); S. Rep. No. 105-190, at 36 (1998) ("To protect the privacy of users of copyrighted works, however, the Register of Copyrights may not include within the definition of CMI any information concerning *users* of copyrighted works.") (emphasis in original).

27. *See generally* CTR. FOR DEMOCRACY AND TECH., PRIVACY PRINCIPLES FOR DIGITAL WATERMARKING (June 2, 2008), http://cdt.org/publications/policyposts/2008/8 (proposing methods for protecting privacy).

28. Hatch, *supra* note 24, at 727 (emphasis in original).

29. *See In re* Verizon Internet Servs., Inc., 240 F. Supp. 2d 24, 38 (D.D.C. 2003) (p2p was "not even a glimmer in anyone's eye when the DMCA was enacted"). In fact, P2P technology could itself be seen, in part, as a reactionary response to the DMCA. *See*

of CMI in order to protect potential threats to consumer privacy. However, in the current context, where legislation to reduce infringement on p2p networks is necessary, and a problem relative to circumvention of transactional watermarks is clearly on the horizon, if not already present, Congress should consider amending the definition of CMI to protect transactional watermarks. Congress should also consider adding anti-trafficking provisions to section 1202 similar to those in section 1201 related to TPMs.[30] Such protections will help technologists develop watermarks that will benefit consumers who wish to engage in personal and transformative copying as well as copyright owners who seek to enforce their rights online.

Many scholars, technologists, and activists would probably object to this proposal given the widespread criticism of the DMCA's anti-circumvention provisions[31] and the very substantial literature on privacy and speech issues in the information economy.[32] Any suggestion that the

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Joel R. Reidenberg, *The Rule of Intellectual Property Law in the Internet Economy*, 44 HOUS. L. REV. 1073, 1084 (2007) ("The rejection of the democratically chosen rule of law is well illustrated by the development of peer-to-peer ('P2P') technology.").

30. *See e.g.*, 17 U.S.C. § 1201(a)(2).

> No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title; (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

Id.

31. *See, e.g.*, Neil W. Netanel, *Why Has Copyright Expanded? Analysis and Critique*, *in* 6 NEW DIRECTIONS IN COPYRIGHT LAW 3 (Fiona Macmillan ed., 2008); JESSICA LITMAN, DIGITAL COPYRIGHT: PROTECTING INTELLECTUAL PROPERTY ON THE INTERNET (2001); Brief Amicus Curiae of Intellectual Property Law Professors in Support of Defendants-Appellants, Universal City Studios v. Corley, 273 F.3d 429 (2d Cir. 2001) (No. 00-9185), 2001 WL 34105194; David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673 (2000); David Nimmer, *Aus Der Neuen Welt*, 93 NW. U. L. REV. 195 (1998).

32. *See, e.g.*, Julie E. Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 U. CHI. L. REV. 181 (2008); Julie E. Cohen, *Cyberspace as/and Space*, 107 COLUM. L. REV. 210 (2007); Sonia Katyal, *Privacy vs. Piracy*, 7 YALE J. LAW & TECH. 222 (2004) [hereinafter Katyal, *Privacy*]; Julie E. Cohen, *DRM and Privacy*, 18 BERKELEY TECH. L.J. 575 (2003) [hereinafter Cohen, DRM]; Sonia K. Katyal, *The New Surveillance*, 54 CASE W. RES. L. REV. 297 (2003); Jerry Kang, *Information Privacy in Cyberspace Transactions*,

prohibitions of chapter 12 should be expanded should be approached with caution. However, when the benefits of watermarks are balanced against their potential detriments, a legislative proposal aimed at broadening the definition of CMI appears to best serve the purpose of copyright, which is to promote learning by encouraging creative output and the availability of creative works.[33] Thus, crafting such a proposal and pushing it through to passage deserves the focus of the copyright community.

Part II of this Article contains a brief overview of the scope of infringement on p2p networks and the inefficacy of attempts to decrease it, as well as a summary of the recent decisions of the major record labels to reduce their utilization of use-restrictive TPMs. Part III focuses on watermarking technology as a potential remedy to the problems discussed in Part II. Part IV analyzes the language and legislative history of section 1202 of the Copyright Act, and proposes amending the section to protect transactional watermarks. Finally, Part V discusses potential objections to amending section 1202, and concludes that the speech-related benefits of protecting transactional watermarks outweigh the potential threats to privacy and speech when viewed in light of copyright law's purpose and the online marketplace's current attitudes.

II. DESPITE PERVASIVE P2P INFRINGEMENT, RECORD LABELS ARE REDUCING THEIR USE OF TPMS

In order to understand the need for greater protection for transactional watermarks, it is necessary to examine, briefly, the rise and continued pre-

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50 STAN. L. REV. 1193 (1998); Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981 (1996) [hereinafter Cohen, *Right to Read*].

33. *See* Reidenberg, *supra* note 29, at 1077 ("Intellectual property law has a critical normative role. The allocation of rights to assure the balance of public values in the dissemination of knowledge, the incentive to create, and the freedom of expression are political choices."); Matt Williams, Note, *Making Encouraged Expression Imperceptible: The Family Movie Act of 2005 is Inconsistent with the Purpose of American Copyright*, 5 VA. SPORTS & ENT. L.J. 233, 235 (2006) ("[T]he purpose of American copyright law is to encourage and enable learning."); Paul Goldstein, *Copyright's Commons*, 29 COLUM. J.L. & ARTS 1, 10 (2005) ("The correct cause for advocacy is copyright itself . . . a system that takes as its balance wheel the need at once to promise authors protection for the product of their labors and to ensure them the freedom to borrow unprotected elements from the works of others."); Peters, *supra* note 2, at 722 ("Striking the balance between meeting consumer expectations and limiting harmful copying and distribution is the key to preserving copyright's standing in the eyes of the public."); Hatch, *supra* note 24, at 723 ("[C]opyright rights should be protected, unless it can be shown that the extent of protection is hampering creativity or the wide dissemination of works.").

valence of p2p networks. Although copyright owners have attempted to combat the large-scale infringement that occurs on these networks through successful litigation and competitive legal services, such as iTunes, musicians and the music industry still suffer myriad copyright violations. After maintaining for some time that it was necessary to utilize TPMs when distributing song files to consumers through online music services, the major record labels have concluded that it is in their interest to try an alternative route to protecting their content despite pervasive p2p infringement.[34]

A. Pervasive p2p Infringement

Shawn Fanning launched the first prominent "file-sharing" network, Napster, in 1999.[35] Within months, over ten million people used Napster.[36] Not long after Napster's arrival, other p2p networks and software, such as KaZaA, LimeWire, Bit Torrent, Aimster, Morpheus, Fast Track, Gnutella and Grokster, sprang up, each utilizing very different, amorphous delivery mechanisms.[37]

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34. *See supra* note 11 and accompanying text.
35. LAWRENCE LESSIG, FREE CULTURE 67 (2004).
36. *Id.*
37. The Supreme Court in *Grokster* described the architecture of such p2p networks:

> [P]eer-to-peer networks [are] so called because users' computers communicate directly with each other, not through central servers. The advantage of peer-to-peer networks over information networks of other types shows up in their substantial and growing popularity. Because they need no central computer server to mediate the exchange of information or files among users, the high-bandwidth communications capacity for a server may be dispensed with, and the need for costly server storage space is eliminated. Since copies of a file (particularly a popular one) are available on many users' computers, file requests and retrievals may be faster than on other types of networks, and since file exchanges do not travel through a server, communications can take place between any computers that remain connected to the network without risk that a glitch in the server will disable the network in its entirety.

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 919-20 (2005). Peter Yu described it this way:

> Unlike MP3.com and Napster, all of the new P2P technologies, such as Grokster, iMesh, KaZaA, and Morpheus, do not have centralized servers. Instead, they allow users to transfer files from one location to another while accommodating users' needs to employ different hardware and software. As a result, enforcement is likely to become difficult. There will be no deep pocket to sue, no chokepoint to target, and no human face to blame.

Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 676 (2005).

Tim Wu has described p2p networks as "the most ambitious effort to undermine an existing legal system using computer code."[38] Copyright owners, and especially the record labels, were to a large extent defenseless against the fast-rising threat that unrestricted file sharing represented to their business. Litigation, however, led to several legal victories, including at the Supreme Court, in which courts rejected the technological attempt to subvert copyright law.[39]

Nevertheless, p2p users continue to access p2p networks and to utilize them for infringement.[40] This has contributed to a rapid decline in music sales and very difficult times for record labels and artists.[41] Online sales of digital music are way up, but they have not yet come close to balancing out the impact of infringement.[42] For example, the record label EMI recently announced that it would have to reorganize itself in order to remain profitable.[43]

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38. Timothy Wu, *When Code Isn't Law*, 89 VA. L. REV. 679, 683 (2003); *see also* Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 535 (2003) (arguing that p2p networks "represent a particularly brazen and successful attack on intellectual property rights"); Reidenberg, *supra* note 29, at 1084–86 (analyzing Wu and Strahilevitz articles). Of course, p2p networks have valuable purposes other than infringement. *See Grokster*, 545 U.S. at 952 (Breyer, J. dissenting) (describing lawful uses of p2p software).

39. *See, e.g.*, *Grokster*, 545 U.S. at 936–37 (2005) (holding that p2p services that intentionally induced copyright infringement were secondarily liable for infringement); A&M Records, Inc. v. Napster, Inc. 239 F.3d 1004, 1014 (9th Cir. 2001) (holding Napster p2p service liable for contributory infringement and vicarious infringement); *In re* Aimster Copyright Litig., 334 F.3d 643, 645–46 (7th Cir. 2003) (holding Aimster p2p service liable for contributory infringement).

40. *See* Press Release, PRWeb, LimeWire Now Found on One-Third of All PCs Worldwide (Dec. 13, 2007), *available at* http://www.prweb.com/releases/2007/12/prweb576418.htm.

41. *See* STEPHEN E. SIWEK, INST. FOR POLICY INNOVATION, THE TRUE COST OF SOUND RECORDING PIRACY TO THE U.S. ECONOMY 14 (2007) (arguing that if one assumes that one out of five illegal downloads over p2p networks represents a lost sale at 99 cents, then U.S. companies lost over six billion dollars in 2005 alone); INT'L FED'N OF THE PHONOGRAPHIC INDUS., IFPI DIGITAL MUSIC REPORT 2008: REVOLUTION, INNOVATION, RESPONSIBILITY (2008), *available at* http://www.ifpi.org/content/library/DMR2008.pdf; *Napster*, 239 F.3d at 1018 ("The district court further found that both the market for audio CDs and market for online distribution are adversely affected by Napster's service.").

42. Raphael G. Satter, *Digital Music Sales Up Worldwide*, ASSOCIATED PRESS, Jan. 24, 2008.

43. *See* Posting of Daniel Kreps to Rolling Stone Rock & Roll Daily Blog, EMI Chairman Confirms Cutbacks, Says Bands May be Sponsored Like Football Teams (Jan. 15, 2008, 5:25 EST), http://www.rollingstone.com/rockdaily/index.php/2008/01/15/emi-chairman-confirms-cutbacks-says-bands-may-be-sponsored-like-football-teams/.

Although the relationship between p2p usage and the current downturn in the music industry is often disputed by copyright skeptics,[44] even former advocates for unauthorized p2p distribution of copyrighted material have concluded that rampant infringement has damaged creative output. For example, Jaron Lanier, the musician and computer scientist who reportedly coined the term "virtual reality," published an essay in the *New York Times* in 1999 entitled *Piracy Is Your Friend*.[45] There, he argued that "you can make more money [as a musician] in the new era of 'free' digital music."[46] However, in November of 2007, Lanier, again in the *New York Times*, stated the following in an essay entitled *Pay Me For My Content*:

> Internet idealists like me have long had an easy answer for creative types—like the striking screenwriters in Hollywood—who feel threatened by the unremunerative nature of our new Eden: stop whining and figure out how to join the party! That's the line I spouted when I was part of the birthing celebrations for the Web. I even wrote a manifesto titled "Piracy Is Your Friend." But I was wrong. We were all wrong.[47]

The sustained high levels of infringement despite the record labels' and artists' courtroom victories have led some governments to consider imposing policing obligations on Internet Service Providers ("ISPs").[48] In France, President Sarkozy has proposed requiring ISPs to terminate the Internet access of repeat infringers.[49] Such proposals have received harsh criticism.[50] And yet, clearly something must be done.[51]

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44. *See, e.g.*, LESSIG, *supra* note 35, at 69.

45. Jaron Lanier, *Piracy Is Your Friend*, *reprinted in* Neil Strauss, *Music: A Chance to Break the Pop Stranglehold*, N.Y. TIMES, May 9, 1999, § 2 (Arts & Leisure), at 1.

46. *Id.*

47. Jaron Lanier, *Pay Me For My Content*, N.Y. TIMES, Nov. 20, 2007, at A23.

48. *See, e.g.*, Dep't for Bus. Enter. & Regulatory Reform, Consultation on Legislative Options to Address Illicit Peer-to-Peer (P2P) File-Sharing 5–6 (2008), *available at* http://www.berr.gov.uk/files/file47139.pdf (proposing a "co-regulatory approach" and an alternative regulatory approach that may include requirements for ISPs to disclose the Internet protocol addresses of alleged infringers); Dep't for Culture, Media & Sport, Creative Britain: New Talents for the New Economy 10 (2008), *available at* http://www.culture.gov.uk/images/publications/CEPFeb2008.pdf.

49. Eric Pfanner, Effort to Combat Internet Piracy Gains Strength in France, N.Y. TIMES, Dec. 3, 2007, at C8.

50. *See, e.g.*, Siy, *supra* note 23.

51. *See* Billy Bragg, *The Royalty Scam*, N.Y. TIMES, Mar. 22, 2008, at A13 ("If young musicians are to have a chance of enjoying a fruitful career, then we need to establish the principle of artists' rights throughout the Internet—and we need to do it now.").

B. Record Labels Decide to Offer "TPM-Free" Music Online

Record labels have endured persistent criticism for using TPMs to restrict the unauthorized copying and distribution of songs purchased online.[52] This criticism became highly publicized when Steve Jobs, the CEO of Apple, published an essay called *Thoughts On Music* in early 2007.[53] The essay, which made public Jobs' frustration with negotiating licenses for content sold on Apple's iTunes platform, repeated a mantra that had been previously put forward, first by Microsoft employees in an article called *The Darknet and the Future of Content Distribution*,[54] and then by technology advocate Fred von Lohmann:[55] "There is no theory of protecting content other than keeping secrets. . . . The problem, of course, is that there are many smart people in the world, some with a lot of time on their hands, who love to discover such secrets and publish a way for everyone to get free (and stolen) music."[56] In other words, Jobs argued that TPMs would inevitably be hacked, therefore failing to provide record labels with any protection against p2p infringement, and at the same time, would frustrate customers who would not be able to engage in personal and transformative copying.

Jobs asked the record labels to "imagine a world where every online store sells [TPM]-free music encoded in open licensable formats [such that] any player can play music purchased from any store, and any store can sell music which is playable on all players."[57] By April of 2007, EMI announced that it would allow iTunes to sell TPM-free song files.[58] Then, in August, Universal Music Group made a similar announcement, although it decided not to offer TPM-free songs through iTunes and to instead do so through services such as Amazon.com.[59] In December of 2007 and January of 2008, respectively, Warner and Sony BMG also decided to

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52. *See, e.g.*, Mulligan & Perzanowski, *supra* note 8.

53. Steve Jobs, Thoughts On Music, Feb. 6, 2007, http://www.apple.com/hotnews/thoughtsonmusic/.

54. Peter Biddle et al., *The Darknet and the Future of Content Distribution* (2002), presented at the 2002 ACM Workshop on Digital Rights Management, *available at* http://crypto.stanford.edu/DRM2002/darknet5.doc.

55. Von Lohmann, *supra* note 6.

56. Jobs, *supra* note 53.

57. *Id.*

58. Press Release, EMI Group, EMI Music Launches DRM-Free Superior Sound Quality Downloads Across Its Entire Digital Repertoire (Apr. 2, 2007), *available at* http://www.emigroup.com/Press/2007/press18.htm [hereinafter EMI Group].

59. Leeds, *supra* note 11.

sell TPM-free songs online.[60] Finally, in January of 2009, Apple ended the debate by announcing that its iTunes store will sell only TPM-free songs.[61]

When EMI first announced its decision, it stated: "EMI is releasing the [TPM-free] downloads in response to consumer demand for high fidelity digital music for use on home music systems, mobile phones and digital music players. EMI's new [TPM]-free products will enable full interoperability of digital music across all devices and platforms."[62] An Apple press release reiterated this goal: "With [TPM]-free music from the EMI catalog, iTunes customers will have the ability to download tracks from their favorite EMI artists without any usage restrictions that limit the types of devices or number of computers that purchased songs can be played on."[63]

Such responsiveness to consumer demands will hopefully help to improve consumers' opinions of record labels and copyright law. Prominent members of the copyright community have recently encouraged copyright owners to make efforts in this regard,[64] and the record labels appear to be doing so despite, or perhaps in part because of, the losses they continue to suffer from infringement on p2p networks.

TPM-free downloads will enable consumers to engage in personal and transformative copying, and may result in increased sales.[65] However, record labels have reportedly been watermarking the TPM-free downloads in an effort to keep tabs on the number that are made available on p2p networks.[66] Thus, in the current music marketplace, protecting watermarks against circumvention may be even more important than protecting TPMs.

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60. McCarthy, *supra* note 11; Posting of Matt Rosoff to Digital Noise, DRM Deathwatch: Warner on Amazon (Dec. 27, 2007, 10:05 PST), http://blogs.cnet.com/-8301-13526_1-9837994-27.html.

61. *See* Brad Stone, *Want to Copy iTunes Music? Go Ahead, Apple Says*, N.Y. TIMES, Jan. 7, 2009. There was not time to make substantial revisions to the article to reflect this breaking news.

62. EMI Group, *supra* note 58.

63. Press Release, Apple, Inc., Apple Unveils Higher Quality DRM-Free Music on the iTunes Store (Apr. 2, 2007), *available at* http://www.apple.com/pr/library/ 2007/04/ 02itunes.html.

64. *See, e.g.*, Peters, *supra* note 2, at 717 (proposing ways to "help copyright retain its good standing in the eyes of the public"); Goldstein, *supra* note 33, at 2–3 (discussing importance of public education regarding copyright's public benefits).

65. *But see* Bill Rosenblatt, *Is EMI's DRM-Free Strategy Working?*, DRM WATCH, Aug. 8, 2007, http://www.drmwatch.com/ocr/article.php/3693316 (suggesting that there does not appear to be evidence of such an increase).

66. Rosenblatt, *supra* note 14.

III. WATERMARKING CAN BENEFIT COPYRIGHT OWNERS AND CONSUMERS

A digital watermark consists of information inserted into a digital file that may identify or explain the copyright owner of the content of the file, the license applicable to the file, the person who purchased the file, and/or other facts related to use of the file.[67] Most digital watermarks are imperceptible by human eyes and ears.[68] In order to "view a watermark, an investigator needs a special program or device (i.e., a 'detector') that can extract the watermark data" and reveal the information.[69]

Watermarking comes in at least two types: transactional (also known as media serialization) and non-transactional.[70] Transactional watermarks contain the identity of the device or user that downloads or purchases the content, in addition to information about the originating service and copyright owner. When the content is found somewhere that it isn't supposed to be (e.g., residing on a p2p network or YouTube), content owners can trace the content back to its original purchaser or downloader to determine who is responsible for the infringing distribution.[71] Non-transactional watermarks do not contain information about the individual user or user's device, but instead simply contain information about the copyright owner, the terms of use, and the service from which the content was purchased.[72] Universal Music Group is reportedly using non-transactional watermarking technology in connection with its offerings, and iTunes is reportedly using transactional watermarking on its TPM-free songs.[73]

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67. *See* Stealthy Audio Watermarking, U.S. Patent No. 7,266,697 col.2 l.65 (filed May 3, 2004) (" In general, a 'digital watermark' is a pattern of bits inserted into a digital image, audio, or video file that identifies the file's copyright information (author, rights, etc.). The name comes from the faintly visible watermarks imprinted on stationary that identify the manufacturer of the stationary.").

68. *Id.* at col.3 l.6–8.

69. *Id.* at col.3 l.18–20.

70. *See* Rosenblatt, *Accelerating*, *supra* note 14.

71. *See* Kravets, *supra* note 14 ("Watermarking offers copyright protection by letting a company track music that finds its way to illegal peer-to-peer networks. At its most precise, a watermark could encode a unique serial number that a music company could match to the original purchaser."); '697 Patent, at col.3 l.50 (detailing watermarks that do not degrade when content is transferred into different formats).

72. Rosenblatt, *Accelerating*, *supra* note 14.

73. *See* Ken Fisher, *Apple Hides Account Info In DRM Free Music, Too,* ARS TECHNICA (May 30, 2007), http://arstechnica.com/news.ars/post/20070530-apple-hides-account-info-in-drm-free-music-too.html.

Watermarks generally do not impose restrictions on how consumers can use copies of works.[74] They nevertheless help copyright owners protect their rights. For example, Random House Audio Publishing Group recently announced that it watermarked eBooks sold in the fall of 2007 without TPMs through the online service eMusic.com.[75] The watermarks enabled Random House to monitor p2p traffic to determine whether selling eBooks without TPMs lead to increased infringement of its works. The test results indicated that the watermarked copies were not being distributed on p2p networks. In fact, copies of eBooks that contained circumvented TPMs were available on p2p networks whereas Random House was unable to find "a single instance of the eMusic watermarked titles being distributed illegally."[76] Random House decided, based on the test, to continue selling TPM-free watermarked eBooks through multiple online platforms.

Allowing copyright owners to test the benefits and security of new business models is only one benefit of watermarks. Record labels have faced difficult evidentiary issues in their lawsuits against individual p2p infringers.[77] Defendants and their supporters often argue, inter alia, that their Internet access accounts have been used by others to make song files available on p2p networks.[78] Proving that a particular defendant is respon-

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74. *See* ACTIVATED CONTENT, THE FUTURE OF WATERMARKING, *available at* http://www.activatedcontent.com/whitepapers/ActivatedContent_FutureOfWatermarking.pdf (last visited Oct. 20, 2008) (discussing survival or robust transfers).

75. Letter from Madeline McIntosh, Senior Vice President & Publisher, Random House Audio Publ'g Group, to Publ'g Partners (Feb. 21, 2008) [hereinafter McIntosh Letter] (on file with beyondthebookcast.com). It is unclear whether these watermarks were transactional watermarks or not.

76. *Id.*

77. *See, e.g.*, Virgin Records America, Inc. v. Thompson, 512 F.3d 724, 725 (5th Cir. 2008) (detailing how defendant alleged that his daughter used his Internet access account for p2p infringement); Capitol Records, Inc. v. Foster, 86 U.S.P.Q.2d (BNA) 1203, 1206 (W.D. Okla. 2007) (discussing defendant's allegation that her Internet access account was being used for p2p infringement by a member of the household other than the original defendant); *see also* MICHAEL PIATEK ET AL., UNIV. OF WASH., DEP'T OF COMPUTER SCIENCE & ENG'G, CHALLENGES AND DIRECTIONS FOR MONITORING P2P FILE SHARING NETWORKS—OR—WHY MY PRINTER RECEIVED A DMCA TAKEDOWN NOTICE 1 (2008), *available at* http://dmca.cs.washington.edu/uwcse_dmca_tr.pdf (describing methods used to "frame" innocent computers for copyright infringement); Robert Kasunic, *Making Circumstantial Proof of Distribution Available*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1145, 1156 (2008) (discussing possibility that files are unknowingly made available for copying through p2p networks).

78. *See, e.g.*, Brief of Amici Curiae American Ass'n of Law Libraries et al. in Support of Defendant Debbie Foster's Motion for Attorneys' Fees, Capital Records, Inc. v.

sible for the infringement observed by record label investigators can be problematic. Transactional watermarks could help to reduce these evidentiary difficulties by more clearly connecting individual copies with individual users. An investigator searching a p2p network for infringing copies could locate a downloadable copy of a popular song in a person's share folder, download that copy, and review the watermark information to determine who originally purchased the copy from which the infringing copy was made. This could be done in a variety of ways, including by embedding a serial number unique to users of online music services rather than including names or other personal information.[79]

Making the labels better able to detect an individual's posting of song files on p2p networks may even reduce the need for litigation. If copyright owners could clearly identify individual infringers, they could seek agreements with online services that would result in account terminations for repeat infringers.[80] A realistic threat of loss of access to such services could prove to be a powerful deterrent against infringement.[81]

Unfortunately, watermarks, like TPMs, are not invulnerable to attack. Although developers are producing watermarks that persist through a variety of format conversions, such as moving a song from a portable device

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Foster, No 04-1569-W, slip op. at 6 (W.D. Okla. 2006). Amici for the defendant in *Capital v. Foster* argued:

> The RIAA's investigators sign into file sharing networks hoping to identify users who are sharing particular songs. However, users on P2P networks are difficult to identify. Each user has a 'screenname' that represents her presence on the network. This screenname is usually some kind of vague or anonymous nickname, e.g. 'musicfan21.' Moreover, on many systems, multiple users can have the same screenname, further obfuscating association with a particular identity. Thus, neither that screenname nor anything else available from the P2P network alone can tie a virtual-world user directly to a specific real-world person.

Id. at 9.

79. Kravets, *supra* note 14. Of course, watermarks would not eliminate all evidentiary difficulties. For example, someone may purchase a song embedded with a watermark related to his or her own account. Someone else in the household may then use the same computer to distribute the song on a p2p network, unbeknownst to the purchaser. Nevertheless, watermarks would reduce much of the confusion surrounding p2p screen names.

80. Such agreements represent an alternative to the legislative proposals pending abroad that would result in loss of Internet access for repeat infringers. *See* note 23 *supra*.

81. *Cf.* S. REP. NO. 105–90, at 52 (1998) ("[T]hose who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access.").

to a desktop, and that appear to be very difficult to circumvent,[82] recent history indicates that "smart people . . . with a lot of time on their hands"[83] can thwart nearly any technological effort to protect works.[84]

Copyright owners will be hesitant to continue the trend of TPM-free songs if watermarks prove ineffective.[85] A reversal of this trend would negatively impact consumers who want to engage in personal and transformative copying. Thus, in order to benefit consumers and decrease infringement, watermarks need adequate legal protection.

IV. INADEQUATE LEGAL PROTECTION FOR WATERMARKS

Transactional watermarks that include information about the users of works could help copyright owners fight infringement on p2p networks. But section 1202 of the Copyright Act, which prohibits altering or removing CMI, likely fails to protect transactional watermarks against circumvention. In addition, section 1202 does not contain any provisions prohibiting trafficking in services or devices designed or marketed to circumvent watermarks of any kind. Congress should consider remedying these inadequacies.

A. The Definition of CMI: Section 1202's History and Text

Although the DMCA became law in 1998, its beginnings lie five years earlier. In 1993, President Clinton created the Information Infrastructure Task Force ("IITF") within the Department of Commerce to craft policies that would assist the development of the national information infrastructure ("NII", i.e., Internet).[86] Two years later, The Working Group on Intel-

82. *See, e.g.*, '697 Patent.

83. Jobs, *supra* note 53.

84. *Cf.* Brief Amici Curiae of Computer Science Professors Harold Abelson et al. Suggesting Affirmance of the Judgment, 2005 WL 497760, at *14, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (No. 04-480) (discussing methods of defeating filtering technologies).

85. In addition, new advertising-based business models that appear to be attracting support from content owners are dependent on watermarks functioning properly. *See* ACTIVATED CONTENT, *supra* note 74. These business models will be unable to develop if watermarks are unreliable. Efforts to provide consumers with additional features by using watermarks are also being considered. *See* Antony Bruno, *High Watermark: New DRM Technology Could Flood Consumers with Bonus Features*, BILLBOARD, Jan. 19, 2008, at 14. Thus, copyright owners and consumers will benefit in many ways from adequate legal protection.

86. IQ Group, Ltd. v. Wiesner Publ'g, LLC, 409 F. Supp. 2d 587, 594 (D.N.J. 2006).

lectual Property Rights, a division within the IITF, released a report describing the likely impact of the NII on intellectual property rights and recommending appropriate changes to U.S. law.[87] This report, often referred to as the "White Paper," proposed draft legislation to create legal protections for "copyright management information" and "copyright protection systems."[88] The draft legislation would have prohibited dealing in devices or services that enabled circumvention of any "mechanism or system which prevents or inhibits the violation of any of the exclusive rights [of the copyright owner] under section 106."[89] It also would have prohibited the knowing removal or alteration of copyright management information. The draft legislation defined CMI as follows: " 'Copyright management information' means the name and other identifying information of the author of a work, the name and other identifying information of the copyright owner, terms and conditions for uses of the work, and such other information as the Register of Copyrights may prescribe by regulation."[90]

Subsequent to the release of the White Paper, the National Information Infrastructure Copyright Protection Act, which contained the White Paper's proposals verbatim, was introduced in Congress.[91] The legislation did not pass. However, the international community was considering addressing the developing Internet at the same time, and in 1996, the World Intellectual Property Organization ("WIPO") Copyright Treaty ("WCT") and the WIPO Performances and Phonograms Treaty ("WPPT") were agreed upon.[92]

These treaties "enhance[d] the exploitation and enforcement of exclusive rights in the digital environment"[93] in response to "the questions raised by new economic, social, cultural and technological developments."[94] In other words, the treaties are the product of an international "recognition that works made available in digital formats may be especial-

87. Bruce A. Lehman, THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INTELLECTUAL PROP. & THE NAT'L INFO. INFRASTRUCTURE (1995).

88. *Id.* at 233–35.

89. *Id.* at 230.

90. *Id.* at 7.

91. *See* H.R. REP. NO. 104-879 (1997) (noting the introduction of H.R. 2441).

92. World Intellectual Prop. Org. [WIPO] Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105–17, 36 I.L.M. 65 (1997); WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105–17, 36 I.L.M. 76 (1997).

93. SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND VOL. II (2d ed. 2006).

94. WIPO Copyright Treaty, *supra* note 92, at 4 (reciting preamble); *see also* WIPO, GUIDE TO THE COPYRIGHT AND RELATED RIGHTS TREATIES ADMINISTERED BY WIPO AND GLOSSARY OF RELATED RIGHTS TERMS (2003).

ly vulnerable to unauthorized copying and redistribution; unless the digital file can be secured against these acts, its susceptibility to unauthorized recirculation may discourage authors from making it digitally available to the general public."[95]

The WIPO treaties require signatories to provide "adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights"[96] as well as "adequate and effective legal remedies against any person knowingly" removing or altering rights management information.[97] Although debate regarding Article 11 of the WCT, which covers TPMs, was heated, the provision covering rights management information "did not raise the kind of controversy raised by those of Article 11."[98] The WIPO treaties defined "rights management information" to mean:

> information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.[99]

After the United States signed the WIPO treaties, legislation was introduced in the Senate to implement them.[100] The legislation used the term "copyright management information" rather than "rights management information" and included a slightly different definition:

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95. RICKETSON & GINSBURG, *supra* note 93, at 966.

96. WIPO Copyright Treaty, *supra* note 92, at 10 (quoting Article 11).

97. *Id.* at 11 (quoting Article 12). Dr. Mihaly Ficsor has explained the difference in wording between Article 11 and Article 12 of the WIPO Copyright Treaty:

> It is to be noted that while Article 11 speaks about the obligation to provide "adequate legal protection and effective legal remedies" this Article [12] "only" obliges Contracting Parties to provide "adequate and effective legal remedies." It seems, however, that the disparity between the two texts is the result of a mere drafting inadvertence, and that the basic nature of the obligations of the Contracting Parties is practically the same under the two provisions.

Mihaly Ficsor, The Law of Copyright and the Internet 564 (2002).

98. *Id.*

99. WIPO Copyright Treaty, *supra* note 92, at art. 12.

100. WIPO Copyright and Performances and Phonograms Treaty Implementation Act, S. 1121, 105th Cong. (1997); *see also* 105 CONG. REC. S8582 (daily ed. July, 31 1997) (statement of Sen. Hatch) (introducing the bill).

> the following information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form—
>
> (1) the title and other information identifying the work, including the information set forth on a notice of copyright;
>
> (2) the name of, and other identifying information about, the author of a work;
>
> (3) the name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright;
>
> (4) terms and conditions for use of the work;
>
> (5) identifying numbers of symbols referring to such information or links to such information; or
>
> (6) such other information as the Register of Copyrights may prescribe by regulation, except that the Register of Copyrights may not require the provision of any information concerning the user of a copyrighted work.[101]

Subparagraph 6 of the definition allowed the Register to broaden the definition through regulations, if needed, but limited her ability to do so where "any information concerning a user of a copyrighted work" was involved.[102] Although the floor statements made related to the introduction of the legislation and the early legislative reports did not indicate why the Register's ability to proscribe regulations was limited in this manner, language from the White Paper expressed a concern that protecting CMI could "unduly burden use of the work by consumers or compromise their privacy."[103]

Protecting citizens' privacy online was a major focus of the Clinton Administration during development of the NII agenda. In fact, the National Telecommunications and Information Administration within the Department of Commerce released a report called *Privacy and the NII: Safeguarding Telecommunications-Related Personal Information* one month

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101. CONG. REC. S. 1121, at section 3.
102. *Id.*
103. Lehman, *supra* note 87, at 191.

after the White Paper was released.[104] This desire to protect privacy is also evident in early versions of the DMCA and resulted in specific privacy exceptions to section 1201.[105] It appears that this concern also led to the limitation on the Register's power.

This limitation remained part of the definition of CMI throughout the legislative process that resulted in passage of the DMCA. In addition, the House and Senate Conferees added an additional privacy related limitation into the definition before passage. This limitation explicitly excludes "any personally identifiable information about a user of a work or of a copy" from the definition.[106] Senator John Ashcroft, who introduced this change, explained that he intended the carve out to "help preserve the critical balance that we must maintain between the interests of copyright owners and the privacy interests of information users."[107]

The legislative history is, for the most part, very unclear regarding the exact meaning of the privacy carve out. The clearest statement is found in the House Manager's Report:

> It also should be noted that the definition of "copyright management information" does not encompass, nor is it intended to encompass, tracking or usage information relating to the identity of users of works. It would be inconsistent with the purpose and construction of this bill and contrary to the protection of privacy to include tracking and usage information within the definition of CMI.[108]

Based on this language, it appears clear that Congress intended the carve out to apply broadly. Although the language of the statute could be

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104. NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, DEPARTMENT OF COMMERCE, PRIVACY AND THE NII: SAFEGUARDING TELECOMMUNICATIONS-RELATED PERSONAL INFORMATION, *available at* http://www.ntia.doc.gov/ntiahome/privwhitepaper.html.

105. For example, the DMCA contained an exception allowing circumvention of access controls where personally identifiable information is involved, 17 U.S.C. § 1201(i) (2002), as well as an entire section stating that:

> [n]othing in this chapter abrogates, diminishes, or weakens the provisions of, nor provides any defense or element of mitigation in a criminal prosecution or civil action under, any Federal or State law that prevents the violation of the privacy of an individual in connection with the individual's use of the Internet.

17 U.S.C. § 1205 (2000).

106. H.R. REP. NO. 105–796, at 14 (1998).

107. 144 CONG. REC. S. 11888, 105th Cong. (daily ed. Oct. 2, 1998) (statement of Sen. Ashcroft).

108. House Manager's Report, *supra* note 26, at 653.

interpreted to only apply to specific types of information about users, i.e., "personally identifiable information",[109] the Manager's Report says that "tracking or usage information *relating* to the identity of users of works" is excluded from the definition of CMI.[110] Under this interpretation, even serial numbers that correspond to a specific user's music service account but otherwise contain no information about the user fall outside of the meaning of CMI. The broad limitation on the Register's power which prevents her from including "*any* information concerning the user of a copyrighted work" also seems to back up this interpretation.[111]

Thus far, no court has considered the scope of the privacy carve out. But the trend in cases involving section 1202 claims has been to interpret the definition of CMI narrowly.[112] In fact, one court, in *IQ Group v.*

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109. The term "personally identifiable information" is not defined in section 1202. However, it is defined elsewhere in the U.S. Code. For example, 11 U.S.C. § 101 (2000) defines it as follows:

> The term "personally identifiable information" means—
>
> (A) if provided by an individual to the debtor in connection with obtaining a product or a service from the debtor primarily for personal, family, or household purposes—
>
> (i) the first name (or initial) and last name of such individual, whether given at birth or time of adoption, or resulting from a lawful change of name;
>
> (ii) the geographical address of a physical place of residence of such individual;
>
> (iii) an electronic address (including an e-mail address) of such individual;
>
> (iv) a telephone number dedicated to contacting such individual at such physical place of residence;
>
> (v) a social security account number issued to such individual; or
>
> (vi) the account number of a credit card issued to such individual; or
>
> (B) if identified in connection with 1 or more of the items of information specified in subparagraph (A)—
>
> (i) a birth date, the number of a certificate of birth or adoption, or a place of birth; or
>
> (ii) any other information concerning an identified individual that, if disclosed, will result in contacting or identifying such individual physically or electronically.

Id. at 41A (A)–(B).

110. House Manager's Report, *supra* note 26, at 653 (emphasis added).

111. 17 U.S.C. § 1202(c)(8) (2000) (emphasis added).

112. *See, e.g.*, Thron v. HarperCollins Publishers, Inc., 64 U.S.P.Q.2d (BNA) 1221, 1222 (S.D.N.Y. 2002) (granting summary judgment for defendant on section 1202 claim because plaintiff's registration was invalid); Kelly v. Arriba Soft Corp., 77 F. Supp. 2d 1116, 1122 (C.D. Cal. 1999), *aff'd in part, rev'd in part*, 336 F.3d 811 (9th Cir. 2003)

Weisner Publishing, interpreted section 1202 only to apply to "copyright management performed by the technological measures of automated systems."[113] Although that court acknowledged that Congress intended section 1202 to protect digital watermarks,[114] it went on to imply that watermarks are only protected if they are mingled with a TPM protected by section 1201: "Chapter 12, as a whole, appears to protect automated systems which protect and manage copyrights. The systems themselves are protected by § 1201 and the copyright information used in the functioning of the systems is protected in § 1202."[115]

If this opinion is read expansively to exclude any watermark that is not coupled with a TPM from protection, then none of the watermarks used by the recording industry in their TPM-free online offerings are covered by section 1202. This is an entirely unsatisfactory result that does not benefit consumers or copyright owners.[116] Fortunately, *IQ Group* is a district court opinion that has not thus far discouraged copyright owners from uti-

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(holding that CMI must be on the work itself rather than alongside the work); Schiffer Publ'g, Ltd. v. Chronicle Books, LLC, 73 U.S.P.Q.2d (BNA) 1090, 1102 (E.D. Pa. 2004) (finding that CMI must be removed "from the 'body' of, or area around, plaintiff's work itself"); Textile Secrets Int'l, Inc. v. Ya-Ya Brand Inc., 524 F. Supp. 2d 1184 (C.D. Cal. 2007) (holding that CMI must be digital, so fabric containing copyright information unprotected). *But see* Med. Broad. Co. v. Flaiz, No. 02-8554, 2003 U.S. Dist. LEXIS 22185, at *8 (E.D. Pa. Nov. 25, 2003) (finding that no registration was required for a section 1202-related claim); McClatchey v. Associated Press, 82 U.S.P.Q.2d (BNA) 1190, 1195 (W.D. Pa. 2007) (holding that CMI need not be digital); *see also* Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 UTAH L. REV. 789, 790 (2007) (endorsing view that section 1202 has proven ineffective); Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 70–73 (2007) (discussing cases).

113. IQ Group, Ltd. v. Wiesner Publ'g, LLC, 409 F. Supp. 2d 587, 597 (D.N.J. 2006).

114. *Id.* at 596.

115. *Id.* at 597.

116. Congress and commentators recognized from the start that CMI could benefit consumers by informing them of valuable information regarding copyright owners. *See, e.g.*, Band, *supra* note 24 at 12. Recently, significant problems related to licensing of works where copyright owners are unknown have received public attention during Copyright Office and Congressional consideration of "orphan works." *See* REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS (2006), *available at* http://www.copyright.gov/orphan/orphan-report-full.pdf; *see also* Eric J. Schwartz & Matt Williams, *Access to Orphan Works: Copyright Law, Preservation, and Politics*, 46 CINEMA J. 139 (2007). CMI can help resolve these problems. *See* Coree Thompson, Note, *Orphan Works, U.S. Copyright Law, and International Treaties: Reconciling Differences to Create a Brighter Future for Orphans Everywhere*, 23 ARIZ. J. INT'L & COMP. L. 787, 808 (2006) ("With fairly strong civil and criminal penalties backing the DMCA's copyright management information provisions, individuals may find that much-desired ownership information will become more readily provided and more reliable.").

lizing watermarks without TPMs. But if subsequent courts adopt an expansive reading of the opinion, copyright owners may be forced to use TPMs in order to obtain protection for their watermarks.[117]

B. The Absence of Prohibitions Against Circumvention Devices and Services

Another inadequacy of the prohibitions of section 1202 that may discourage copyright owners from abandoning TPMs in some contexts is the lack of provisions prohibiting trafficking in devices and services that enable consumers to strip CMI from copies of works. Section 1201 prohibits circumvention of access controls by consumers as well as dealing in circumvention devices or services that enable circumvention of access controls or copy controls.[118]

In contrast, section 1202 only prohibits removing or altering CMI. This results in rather ineffective protection because it is very difficult to know who stripped a copy of CMI once the CMI is removed. It is much more practical to prohibit dealing in devices (such as software) and services designed to remove or alter CMI.

Judge Lewis Kaplan of the U.S. District Court for the Southern District of New York explained the problem in relation to TPMs as follows:

> Dissemination of decryption technology over the Internet is analogous to spreading an infectious disease. Every downloaded copy of the technology is itself capable both of performing acts of infringement and of yielding other copies of the decryption technology just as every person carrying an infectious pathogen may get ill and may also infect others with whom the person comes into contact. Once a decryption program is disseminated, finding its source cannot stop its use for infringement. And given the speed and size of the Internet, dissemination is tantamount to use.[119]

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117. A recent opinion explicitly followed *IQ Group*, but included language that appears to retreat from the more expansive reading of *IQ Group*. *See Textile Secrets*, 524 F. Supp. 2d at 1201–02 ("[T]he Court nevertheless cannot find that the provision was intended to apply to circumstances that have no relation to the Internet, electronic commerce, automated copyright protections or management systems, public registers, or other technological measures or processes as contemplated in the DMCA as a whole.").

118. 17 U.S.C. § 1201 (2000).

119. Lewis A. Kaplan, *Copyright in the Digital Age: The 2001 Donald C. Brace Memorial Lecture Delivered at Fordham University School of Law on Nov. 12, 2001*, 49 J. COPYRIGHT SOC'Y U.S.A. 1, 15–16 (2001).

Professor Neal Netanel has also concluded that "the copyright industries accurately contend, if technological controls are to have any chance of being broadly effective, the law must prohibit the dissemination of software and other devices capable of skirting DRM technology."[120] Similarly, as long as devices and services aimed at removing transactional watermarks are allowed to proliferate, such watermarks will fail to be "broadly effective" infringement deterrents.[121]

The legislative history fails to illuminate why Congress did not choose to prohibit devices and services aimed at enabling violations of section 1202. The White Paper did not propose doing so without explanation. However, failing to prohibit such devices and services arguably places the United States in conflict with its obligations under the WIPO Treaties.

The United States, and other nations, chose to prohibit devices and services that enable circumvention of TPMs because doing otherwise would have violated our treaty obligations.[122] As Dr. Mihaly Ficsor, the Assistant Director General of WIPO at the time the treaties were drafted and signed, has said:

> It should be taken into account that, in general, the acts of circumvention of technological protection measures will be carried out by individuals in private homes or offices, where enforce-

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120. Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 10 (2003).

121. Marybeth Peters, the Register of Copyrights, has explained that:

> For copyright owners, technological protection can never be more than half of the answer. Technology can always be matched and surpassed by technology; the most ingenious anti-copying system will eventually be circumvented by the development of ingenious anti-anti-copying systems. In the area of computer programs, for example, every program developed to prevent unauthorized copying has ultimately been defeated by a program that instructs the computer to ignore the first program. If technology is to provide a solution to the enforcement challenge, it is imperative to devise some method to put an end to the cycle.

Marybeth Peters, *The Spring 1996 Horace S. Manges Lecture—The National Information Infrastructure: A Copyright Office Perspective*, 20 COLUM.-VLA J.L. & ARTS 341, 343 (1996).

122. *See* H.R. REP. NO. 105-551 (1998). Congress was mindful of the United States's obligations under international law to prevent circumvention:

> There will be those who will try to profit from the works of others by decoding the encrypted codes protecting copyrighted works, or engaging in the business of providing devices or services to enable others to do so. A new "Section 1201" to the Copyright Act is required by both WIPO Treaties to make it unlawful to engage in such activity.

Id. at pt.1, at 10.

> ment will be very much more difficult, inter alia, because of objections thrown up by some privacy considerations. Thus, if legislation tries only to cover the acts of circumvention themselves, it cannot provide adequate legal protection and effective legal remedies against such acts which, in spite of the treaty obligations, would continue uncontrolled. It is, however, still possible to provide such protection and remedies. Considering the complexity of the technology involved, in most cases, such acts may only take place after the acquisition of the necessary circumvention device or service. Thus, the possible direction of providing the protection and remedies in harmony with the obligations is as follows: to stop the unauthorized acts of circumvention by cutting the supply line of illicit circumvention devices and services by prohibiting the manufacture, importation and distribution of such devices and the offering of such services.[123]

Dr. Ficsor's conclusion regarding this approach to implementing the treaties' requirement has been endorsed by other respected scholars, such as Jane Ginsburg, Sam Ricketson, Jorg Reinbothe, and Silke von Lewinski, as well.[124] Given that WIPO Treaties signatories are obligated to provide the same level of protection to rights management information,[125] or CMI as it is called in the United States, similar device and services prohibitions appear to be required.

Even if such prohibitions are not required, they are desirable. Many of the objections that commentators have raised about prohibitions around enabling circumvention of TPMs do not apply to prohibitions against dealing in devices or services that enable removal or alteration of copyright management information. For example, scholars such as David Nimmer have expressed concern that the prohibitions related to TPMs will prevent people from engaging in activities that qualify as fair use.[126] Preventing

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123. Ficsor, *supra* note 97, at 549.

124. *See* Ricketson & Ginsburg, *supra* note 93, at 976–77 (concluding that it should not be inferred from the absence of an explicit requirement in article 11 of the WCT that signatories are not required to prohibit dealing in circumvention devices and services); JÖRG REINBOTHE & SILKE VON LEWINSKI, THE WIPO TREATIES 1996 144 (2002) (limiting prohibition to acts of circumvention "would not correspond to the objective of the provision" because "the manufacturing and distribution of devices which permit of facilitate circumvention may potentially cause more important prejudice to rightholders than acts of circumvention").

125. *See* Ficsor, *supra* note 97, at 564.

126. *See generally* David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673 (2000).

people from removing or altering watermarks would not prevent anyone from engaging in fair use or any other form of copying.[127]

Adding prohibitions against dealing in devices or services aimed at altering or removing CMI (including transactional watermarks) would provide copyright owners a valuable new tool and discourage infringement without unduly burdening users of works, who will be able to engage in transformative and personal copying. Applying Senator Hatch's standard for judging copyright legislation aimed at technologies, this proposal meets the test:[128] (1) such legislation is necessary to freeing copyright holders from reliance upon TPMs; (2) the circumvention of transactional watermarks is an identifiable problem, or at the very least is clearly on the horizon; and (3) the proposal may be implemented while still allowing watermarking technology to develop in any direction.

V. PRIVACY AND SPEECH CONCERNS: PROTECTING WATERMARKS WOULD ENCOURAGE MORE SPEECH THAN IT WOULD CHILL

This Part addresses several legitimate privacy and speech concerns, concluding that the proposal's benefits ultimately outweigh them.

Anonymous speech is protected by the First Amendment in many contexts, including online.[129] If the definition of CMI were expanded to in-

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127. It may prevent someone from anonymously engaging in fair use. *See infra* Part V.

128. *See* Hatch, *supra* note 24, at 727. I believe the proposal also satisfies, to the extent that it is applicable, the test for determining whether proposed intellectual property laws deserve passage put forward by Congressman Robert W. Kastenmeier and Michael J. Remington in their article, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?*, 70 MINN. L. REV. 417 (1985), which has been endorsed by Lawrence Lessig in his article, *The Balance of Robert Kastenmeier*, 2004 WIS. L. REV. 1015, 1029 (2004). That test requires copyright legislation to meet the following requirements:

> First, the proponent of a new interest ought to show that the interest can fit harmoniously within the existing legal framework without violating existing principles or basic concepts. . . . Second, the proponent of a new intellectual property interest must be able to commit the new expression to a reasonably clear and satisfactory definition. . . . Third, the proponent of change should present an honest analysis of all the costs and benefits of the proposed legislation. . . . Fourth, any advocate of a new protectable interest should show on the record how giving protection to that interest will enrich or enhance the aggregate public domain.

Kastenmeier & Remington, at 440–41.

129. *See In re* Verizon Internet Servs., Inc., 257 F. Supp. 2d 244, 258 (D.D.C. 2003) ("The First Amendment Protects Anonymous Expression on the Internet."); London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 163 (D. Mass. 2008) ("[W]hile the aspect of

clude transactional watermarks that contain information about the users (e.g., purchasers) of digital files, it would be unlawful for individuals to remove CMI in order to use copyrighted works in anonymous speech, including speech authorized by the fair use doctrine, such as political parody or satire.[130] Commentators have argued that courts should strike down legislative efforts to protect copyrights online that inhibit anonymous speech.[131] Moreover, the Supreme Court has instructed the lower courts to apply some level of First Amendment scrutiny when Congress has "altered the traditional contours of copyright protection. . . ."[132]

However, the Supreme Court has stressed that copyright laws themselves provide speech-related benefits. "[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[133] Given that copyright simultaneously benefits and inhibits speech, it deserves a unique place in our First Amendment jurisprudence.[134] Justice Stephen Breyer, a copyright skeptic,[135] dissenting in *Eldred v. Ashcroft*, suggested that the Court should develop a copyright-specific standard of First Amendment review to determine whether a statute lacks "rational support."[136] This standard would set a lower threshold than traditional "strict" or "intermediate" scrutiny, which is appropriate given that copyright laws are a constitutionally endorsed mechanism of creating speech related benefits that sometimes simultaneously burden some speech.[137] Although the test comes from a dis-

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a file-sharer's act that is infringing is not entitled to First Amendment protection, other aspects of it are.").

130. Of course, Congress could choose to explicitly create a fair use exception to the prohibition against removing CMI. However, this may undermine the overall effect of expanding the definition.

131. *See, e.g.*, Cohen, *Right to Read*, *supra* note 32; Katyal, *Privacy*, *supra* note 32.

132. Eldred v. Ashcroft, 537 U.S. 186, 221 (2003).

133. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

134. *See cf.* Melville B. Nimmer, *The Right to Speak From* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 953 (1968) (discussing the speech benefits of properly restrained defamation laws, and the unique approach to defamation articulated by the Supreme Court in *New York Times v. Sullivan*).

135. *See* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs*, 84 HARV. L. REV. 281, 329 (1970) ("[T]he harms that [copyright] causes grow more rapidly than the benefits that it yields.").

136. *Eldred v. Ashcroft*, 537 U.S. at 245 (Breyer, J., dissenting).

137. If a statute qualifies as "content based," courts apply a test referred to as strict scrutiny to determine whether the statute is constitutional. *See* U.S. v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling government interest."). If a statute

senting opinion, no Supreme Court majority opinion has articulated what the appropriate level of scrutiny is for a copyright statute that alters the traditional contours of copyright protection.[138] The Court has set lower levels of scrutiny in other contexts,[139] and if courts applied such a standard to legislation expanding the definition of CMI, the legislation should satisfy the requirements of the First Amendment.[140]

A. The First Amendment Protects Anonymous Speech

The Supreme Court has eloquently protected anonymous literary and political speech. In *Talley v. California*, the Court struck down a Los Angeles City ordinance restricting the distribution of handbills without printing the name of the creators and distributors on the covers.[141] California tried to defend the ordinance by arguing that disclosure of names was required to "identify those responsible for fraud, false advertising and libel."[142] But Justice Black's opinion explained that such a justification is insufficient given that "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups . . . have been able to criticize oppressive practices and laws either anonymously or not at all."[143]

Thirty-five years later, in *McIntyre v. Ohio Elections Commission*, the Court once again confronted a statute that required leafleters to disclose their identities.[144] The Ohio law at issue only imposed such a requirement, however, where the leaflets were designed to influence voters in an elec-

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qualifies as "content neutral," courts apply intermediate scrutiny. *See* Turner Broad. Sys. v. FCC, 520 U.S. 180, 189 (1997) (holding that intermediate scrutiny requires that a statute "[1] advances important government interests unrelated to the suppression of free speech and [2] does not burden substantially more speech than necessary to further those interests.").

138. Lower courts have applied intermediate scrutiny is some cases. *See, e.g.*, Universal City Studios, Inc. v. Corley, 273 F.3d 429, 450 (2d Cir. 2001).

139. *See* Catherine J.K. Sandoval, *Antitrust Language Barriers: First Amendment Constraints on Defining an Antitrust Market by a Broadcast's Language, and its Implications for Audiences, Competition, and Democracy*, 60 FED. COMM. L.J. 407, 414–20 (2008) (discussing lower levels of scrutiny applied to commercial speech and broadcast regulations).

140. In my opinion, legislation protecting transactional watermarks would also pass intermediate scrutiny if it was properly drafted to preserve to the extent practicable the privacy required for anonymous speech.

141. Talley v. California, 362 U.S. 60, 65 (1960).

142. *Id.* at 64.

143. *Id.*

144. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

tion. Nevertheless, the Court again struck down the law. Justice Stevens concluded:

> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.[145]

The Court picked up on this stirring language once again in *Buckley v. American Constitutional Law Foundation*.[146] There, the Court considered the constitutionality of a Colorado law that required, inter alia, petition distributors to wear name badges. Justice Ginsburg reasoned that the "badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest," and held the provision invalid.[147]

Scholars have relied on cases like *Talley*, *McIntyre*, and *Buckley*, among others,[148] in thoughtful and important articles about the relationship between copyright, anonymity, and privacy.[149] In a 1996 article entitled *A Right to Read Anonymously*, Julie Cohen argued "that reading is so intimately connected with speech, and so expressive in its own right, that the freedom to read anonymously must be considered a right that the First Amendment protects."[150] Professor Cohen also concluded that any law that prohibits a reader from tampering "with copyright management systems solely to preserve their own anonymity or the anonymity of others" would be unconstitutional.[151]

David Nimmer seconded Professor Cohen's objections to decreased anonymity in the name of copyright protection in his 1998 article *Aus Der*

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145. *Id.* at 357.
146. Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999).
147. *Id.* at 199.
148. *See, e.g.*, Lamont v. Postmaster Gen., 381 U.S. 301 (1965); Stanley v. Georgia, 394 U.S. 557 (1969).
149. *See supra* note 32.
150. Cohen, *Right to Read*, *supra* note 32 at 1038–39.
151. *Id.* at 1039.

Neuen Welt.[152] Professor Nimmer argued that "[w]hen the government has available to it an unexpurgated printout of each and every word, note, and image that has entered my brain for the past dozen years, then the era of Big Brother will have dawned."[153]

More recently, Sonia Katyal has argued that copyright owners who use technological means to monitor online activities for infringement create a panopticon of sorts for Internet users that chills free expression, such as transformative uses of copyrighted material.[154] In Professor Katyal's scenario, the inability of creators to confidently use the works of other creators in new works of authorship without fear of exposure discourages the production and distribution of the very expression copyright laws are intended to promote.[155]

The concerns expressed by Professors Cohen, Nimmer, and Katyal are rooted in the Supreme Court precedents that justify protection for anonymity and privacy in terms similar to those used to justify the existence of copyright protection. For example:

> Great works of literature have frequently been produced by authors writing under assumed names. Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or addi-

152. Nimmer, *Aus Der Neuen Welt*, *supra* note 31, at 210.

153. *Id.*

154. Katyal, *Privacy*, *supra* note 32, at 318 ("The Panopticon refers to the design of a prison that facilitates constant surveillance by placing guards in a central tower, thereby creating a sense of 'conscious and permanent visibility that assures the automatic functioning of power.' ") (quoting OSCAR H. GANDY, JR., THE PANOPTIC SORT: A POLITICAL ECONOMY OF PERSONAL INFORMATION 9 (1993)); *see also* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 195 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975).

155. *See* Golan v. Gonzales, 501 F.3d 1179, 1188 (10th Cir. 2007) ("It is clear that the Copyright Clause is meant to foster values enshrined in the First Amendment. The Clause's primary purpose is to provide authors with incentives to produce works that will benefit the public.") (internal citation omitted).

> tions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.[156]

Thus, privacy and the right to speak anonymously, or to choose not to speak at all, are clearly linked to creative output, and have a similar underlying justification to copyright laws.[157]

Nevertheless, privacy rights, and copyright rights are not always pulling in the same direction. As Professor Cohen has written: "Privacy rights in information about intellectual activities and preferences preserve the privacy interest in (metaphoric) breathing space for thought, exploration, and personal growth."[158] Her choice of words connects privacy rights and anonymity to the "breathing space" that the Supreme Court has said the fair use doctrine creates "within the confines of copyright."[159] Such breathing space is required by the First Amendment.[160] Although speech related privacy protection and copyright protection have similar rationales,

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156. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995).

157. In fact, copyright law itself has been used to protect privacy interests. *See, e.g.*, Roger J. Miner, *Exploiting Stolen Text: Fair Use or Foul Play?*, 37 J. COPYRIGHT SOC'Y 1, 6–11 (1989) (arguing that copyright should prevent exposure of unpublished letters); Jonathan Zittrain, *What the Publisher Can Teach the Patient: Intellectual Property and Privacy in the Era of Trusted Privication*, 52 STAN. L. REV. 1201, 1203 (2000) (arguing that "there is a profound relationship between those who wish to protect intellectual property and those who wish to protect privacy"); Cohen, *DRM*, *supra* note 32, at 593 (stating that "[t]he argument that effective privacy protection should include control over the spaces of intellectual consumption finds support . . . within both the substantive provisions and the overall structure of copyright law").

158. Cohen, *DRM*, *supra* note 32, at 578; *see also* Julie E. Cohen et al., *Copyright & Privacy—Through the Privacy Lens*, 4 J. MARSHALL. REV. INTELL. PROP. L. 273, 282 (2004).

159. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994). This is an interesting connection given that fair use has been used to reduce the scope of privacy rights pertaining to unpublished works. As Judge Pierre Leval has argued:

> I do not argue that a writer of private documents has no legal entitlement to privacy. He may well have such an entitlement. The law of privacy, however, and not the law of copyright supplies such protection. Placing all unpublished private papers under lock and key, immune from any fair use, for periods of fifty to one hundred years, conflicts with the purposes of the copyright clause. Such a rule would use copyright to further secrecy and concealment instead of public illumination.

Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1119 (1990). Joseph Liu also has written about the connection between the "breathing space" created by the fair use doctrine and the "breathing space" created by First Amendment exceptions to defamation and tort law. *See generally* Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429 (2007).

160. *See* Eldred v. Ashcroft, 537 U.S. 186, 221 (2003) (describing ways in which the fair use doctrine protects speech).

there are spaces in which they collide. In such circumstances, it is necessary to consider which type of protection better serves speech interests.[161]

B. The Traditional Contours of Copyright Protection

Given that scholars like Professors Nimmer and Cohen were urging the importance of anonymity and privacy online while Congress was in the process of implementing the WIPO treaties, Congress may have had the Supreme Court's emphatic protection of anonymity and privacy related to creative and political expression in mind when it chose to exclude identifying information from the definition of CMI. However, the Supreme Court has consistently viewed copyright laws as "the engine of free expression."[162] Most recently, in *Eldred v. Ashcroft*, where the constitutionality of the Sonny Bono Copyright Term Extension Act[163] was at issue, Justice Ginsburg's majority opinion explained that when copyright revisions do not "alter[] the traditional contours of copyright protection," further First Amendment review is unnecessary because copyright laws themselves function alongside the First Amendment to increase public speech.[164]

Commentators have struggled to determine what the traditional contours of copyright protection are.[165] Although *Eldred* clearly labeled the fair use doctrine and the idea/expression distinction as "built in free speech safeguards" that make up part, if not all, of the traditional contours, the opinion left the exact scope of the phrase unpronounced.[166]

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161. Similarly, there are circumstances in which freedom of speech collides with privacy protections. The Supreme Court has fashioned tests to determine when the First Amendment trumps state privacy statutes. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) ("Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.").

162. *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

163. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17 U.S.C. §§ 108, 203, 301, 304).

164. *Eldred*, 537 U.S. at 221.

165. *See, e.g.*, Robert Kasunic, *Preserving the Traditional Contours of Copyright*, 30 COLUM. J.L. & ARTS 397 (2007); Matt Williams, Comment, *Balancing Free Speech Interests: The Traditional Contours of Copyright Protection and the Visual Artists' Rights Act*, 13 UCLA ENT. L. REV. 105 (2005) [hereinafter Williams, Balancing]; Marshall Leaffer, *Life After Eldred: The Supreme Court and the Future of Copyright*, 30 WM. MITCHELL L. REV. 1597 (2004); Michael D. Birnhack, *Copyright Law and Free Speech After Eldred v. Ashcroft*, 76 S. CAL. L. REV. 1275 (2003).

166. *Eldred*, 537 U.S. at 221.

Recently, a Circuit split has arguably developed between the Ninth Circuit and the Tenth Circuit on this point.[167] In *Kahle v. Gonzales*, the plaintiff argued that Congress altered the traditional contours of copyright protection by eliminating the copyright renewal requirement for works created between 1964 and 1977.[168] The government argued in response that the traditional contours of copyright protection consist of the fair use doctrine and the idea/expression distinction alone.[169] The Ninth Circuit concluded in May of 2007 that "extending existing copyrights while preserving speech-protective measures does not alter the 'traditional contours of copyright protection.' "[170]

Four months later, the Tenth Circuit, in *Golan v. Gonzales*, confronted whether Congress altered the traditional contours of copyright protection by restoring copyright protection for works of foreign authorship that had entered the public domain due to U.S. formalities such as renewal, registration, and publication with notice.[171] The court concluded, without referencing *Kahle*, that "one of the[] traditional contours is the principle that once a work enters the public domain, no individual—not even the creator—may copyright it."[172]

In a much more detailed analysis of the relationship between the First Amendment and copyright laws than found in *Kahle*, the *Golan* opinion stated: "It is clear that the Copyright Clause is meant to foster values enshrined in the First Amendment. The Clause's primary purpose is to provide authors with incentives to produce works that will benefit the pub-

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167. *See* Christopher A. Mohr, *Traditional Contours of Copyright, Silver Lining or Storm Clouds*, 1(1) LANDSLIDE 30, 33 (2008) (arguing that the Tenth Circuit has given a "far broader reading to the *Eldred*'s traditional contours pronouncement" than the Ninth Circuit).

168. Kahle v. Gonzales, 474 F.3d 665, 668, *reh'g en banc denied*, *amended by*, 487 F.3d 697 (9th Cir. 2007), *cert. denied*, Kahle v. Mukasey, 128 S. Ct. 958 (2008) (analyzing the constitutionality of the Copyright Renewal Act of 1992, Pub. L. No. 102-307, 106 Stat. 264 (codified at 17 U.S.C. § 304 (2000), and the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998)).

169. *See* Brief for the Appellee, 2005 WL 926823, at *15, Kahle v. Gonzales, 474 F.3d 665, *reh'g en banc denied*, *amended by*, 487 F.3d 697 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 958 (2008) (No. 04-17434) ("[N]either the 1992 Act nor the CTEA alters 'the traditional contours of copyright protection'—in particular, the 'traditional First Amendment safeguards,' i.e., the 'idea/expression dichotomy' and the 'fair use' defense comprising copyright law's 'built-in First Amendment accommodations'—and thus these statutes require no further First Amendment scrutiny.").

170. *Kahle*, 487 F.3d at 700.

171. Golan v. Gonzales, 501 F.3d 1179 (10th Cir. 2007).

172. *Id.* at 1184.

lic."[173] Nevertheless, the court read *Eldred* to limit Congress' ability to pass laws designed to create such incentives if Congress alters the "functional" or the "historical" aspects of copyright protection. By functional, the Tenth Circuit meant "the outline" or "the general form or structure" of copyright protection. By historical, the Court referred to the "bedrock principle" by which Congress has traditionally legislated in the copyright area.[174] Thus, in the Tenth Circuit, legislation alters the traditional contours of copyright protection if it revises the scope of protection in a manner inconsistent with the historical progression of copyright laws.

Regardless of whether the Tenth Circuit, the Ninth Circuit, or the U.S. Government is correct regarding the meaning of the mysterious *Eldred* phrase, a further question exists regarding the proper method of First Amendment review of copyright laws that do alter the traditional contours of copyright protection: the appropriate level of scrutiny. Even if a statute clearly alters the traditional contours, what test should be used to determine constitutionality? The *Golan* opinion instructed the district court on remand to determine whether the statute at issue is content based or content neutral, and then, based on that determination, to apply either strict scrutiny or intermediate scrutiny.[175] However, this instruction ignores Justice Breyer's dissent in *Eldred*, which proposed a form of rational basis review applicable exclusively to copyright statutes.[176] That level of review would set a less strenuous standard for constitutionality based on copyright's relationship to the First Amendment: copyright benefits speech while at the same time restricting speech.

Although Justice Breyer believed that the statute at issue in *Eldred*, the Copyright Term Extension Act,[177] was unconstitutional, he recognized that copyright laws have a unique place in our Constitutional system.

> The Copyright Clause and the First Amendment seek related objectives-the creation and dissemination of information. When working in tandem, these provisions mutually reinforce each other, the first serving as an "engine of free expression," the second assuring that government throws up no obstacle to its dissemination. At the same time, a particular statute that exceeds proper Copyright Clause bounds may set Clause and Amendment at cross-purposes, thereby depriving the public of the

173. *Golan*, 501 F.3d at 1188.

174. *Id.* at 1187.

175. *Id.* at 1196.

176. Eldred v. Ashcroft, 537 U.S. 186, 245 (2003) (Breyer, J., dissenting).

177. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17 U.S.C. §§ 108, 203, 301, 304).

> speech-related benefits that the Founders, through both, have promised.[178]

Because of copyright's unique legal role, Justice Breyer suggested that traditional standards of scrutiny designed for other types of statutes are inapplicable to copyright statutes.

> There is no need in this case to characterize that review as a search for " 'congruence and proportionality,' " or as some other variation of what this Court has called "intermediate scrutiny[.]" Rather, it is necessary only to recognize that this statute involves not pure economic regulation, but regulation of expression, and what may count as rational where economic regulation is at issue is not necessarily rational where we focus on expression-in a Nation constitutionally dedicated to the free dissemination of speech, information, learning, and culture. In this sense only, and where line-drawing among constitutional interests is at issue, I would look harder than does the majority at the statute's rationality-though less hard than precedent might justify. Thus, I would find that the statute lacks the constitutionally necessary rational support (1) if the significant benefits that it bestows are private, not public; (2) if it threatens seriously to undermine the expressive values that the Copyright Clause embodies; and (3) if it cannot find justification in any significant Clause-related objective. Where, after examination of the statute, it becomes difficult, if not impossible, even to dispute these characterizations, Congress' "choice is clearly wrong."[179]

Given that Justice Breyer has a tendency to question copyright's underlying premise, it is likely safe to assume that the other Justices would not suggest applying a more strenuous level of scrutiny than the one he set out in *Eldred*.[180] Thus, the Tenth Circuit's instruction to the district court in *Golan* may have been inconsistent with the Supreme Court's approach to speech related copyright statutes. After all, Justice Ginsburg's majority opinion in *Eldred* rejected the "imposition of uncommonly strict scrutiny on a copyright scheme that incorporates its own speech protective purposes. . . ."[181] Even if we assume that hypothetical legislation expanding the scope of the definition of CMI to protect transactional watermarks would alter the traditional contours of copyright protection, and thus require a

178. *Eldred*, 537 U.S. at 244 (internal citations omitted).

179. *Id.* at 244–45 (internal citations omitted).

180. *See* Breyer, *supra* note 135, at 350 ("[T]he general case for copyright protection is weak.").

181. *Eldred*, 537 U.S. at 218–19.

court to apply some form of First Amendment scrutiny to determine its constitutionality, no Supreme Court precedent suggests that intermediate or strict scrutiny is the appropriate standard. If we apply Justice Breyer's test instead, as this article does in the next Section, then such legislation should be found compliant with the First Amendment.

C. Protecting Transactional Watermarks Would Likely Alter the Traditional Contours of Copyright Protection but The Speech Related Benefits of Expanding the Definition of CMI Would Outweigh the Potential Chilling Effects

As discussed above, First Amendment protection for anonymous speech creates "breathing space" for artistic and political expression in a manner analogous to the fair use doctrine's creation of "breathing space within the confines of copyright."[182] Regardless of the precise scope of the traditional contours of copyright protection, it is clear that Justice Ginsburg included the speech related benefits of the fair use doctrine within that scope.[183] The fair use doctrine prevents copyright from discouraging artistic and political speech because it declares some transformative works, such as certain satires and parodies, noninfringing.[184] Similarly, protecting anonymous speech prevents identity disclosure from discouraging distribution of such satires and parodies.[185] If the Copyright Act prohibited me from removing a watermark from a copy of a work that disclosed my identity, and I used that copy in a new work of authorship that criticized the underlying work, I may be discouraged from distributing the critical transformative work. This discouragement likely alters the traditional contours of copyright protection. Central to Justice Ginsburg's rea-

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182. *See supra* notes 158–162 and accompanying text.

183. *See Eldred*, 537 U.S. at 221 (stating that "copyright's built-in free speech safeguards are generally adequate" to address First Amendment challenges).

184. *See* Williams, *Transformative*, *supra* note 12, at 315–16. Labeling a work a parody or satire does not allow the author to reproduce another's creative expression gratuitously:

> [A] parody is likely fair where it 'needs to mimic an original to make its point.' However, where such a need does not exist and an author uses another author's expression to criticize a general societal ailment (e.g., a satire) by grabbing the audience's attention with the pre-existing use, less justification exists, and other factors may prove the transformative use unfair. This is not to say that parodies are always fair, or that satires are not, but only that the two types of transformative uses are of differing weights.

Id.

185. *See* Cohen, *DRM*, *supra* note 32, at 598 ("Anonymity . . . allows fair users to decide later whether to reveal their identities when releasing their work.").

soning in *Eldred* was that "[t]he First Amendment securely protects the freedom to make—or decline to make—one's own speeches; it bears less heavily when speakers assert the right to make other people's speeches."[186] Requiring creators of transformative works to disclose their identities arguably forces them to speak in a manner they would prefer not to. Doing so likely alters the traditional contours of copyright protection.[187]

Nevertheless, even assuming that to be true, expanding the definition of CMI to protect transactional watermarks is likely constitutional under Justice Breyer's test. Under that test, a statute is unconstitutional "(1) if the significant benefits that it bestows are private, not public; (2) if it threatens seriously to undermine the expressive values that the Copyright Clause embodies; and (3) if it cannot find justification in any significant Clause-related objective."[188]

First, the significant benefits of protecting transactional watermarks are both private and public. The benefits are arguably private in that they assist copyright owners in enforcing their copyrights. However, they are public in that protecting transactional watermarks will encourage copyright owners to reduce the use of use-restrictive TPMs that prevent consumers from engaging in personal and transformative copying. The benefits are also public in that the p2p distribution of copies threatens the continued viability of copyright-based business models and in so doing undermines copyright's foundational premise; that granting exclusive rights in works leads to increased creative expression and distribution thereof.[189] As Erwin Chemerinsky has stated, "Copyright laws are permitted, even in a society that deeply values freedom of speech, because they are seen overall as enhancing expression. . . . Without copyright protections, less speech would occur."[190] If we allow infringement on p2p networks to go unchecked, copyright based industries will suffer further, and the public will likely obtain access to fewer works as a result.[191]

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186. *Eldred*, 537 U.S. at 221.

187. *See generally* Williams, *Balancing*, *supra* note 165.

188. *Eldred*, 537 U.S. at 245 (Breyer, J., dissenting).

189. *Id.* at 219 ("The Copyright Clause and the First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles. Indeed, copyright's purpose is to *promote* the creation and publication of free expression.") (emphasis in original).

190. Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act is Unconstitutional*, 36 LOY. L.A. L. REV. 83 (2002).

191. *See id.* at 84 ("I wrote an amicus brief for the Ninth Circuit in the Napster case, arguing that applying copyright laws in that situation enhanced speech. Allowing for distribution of copyrighted music without paying royalties would lessen the incentives for musicians, their producers, and distributors to engage in speech activities."); *see also*

Second, protecting transactional watermarks would not seriously undermine the expressive values that the Copyright Clause embodies. Enabling copyright owners to protect their rights is an essential part of providing adequate copyright protection.[192] Prohibiting removal of transactional watermarks, as discussed above, would reduce evidentiary problems associated with proving infringement by p2p users.[193] Courts have consistently held that the First Amendment does not prevent copyright owners from obtaining the identity of alleged infringers.[194] Although protecting transactional watermarks may discourage some creative expression in the form of anonymous fair use, it would not seriously undermine the expressive values of the Copyright Clause when this discouragement is compared to the encouragement that protecting transactional watermarks would provide to

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Brief of Amici Curiae Motion Picture Association of America, Inc. (MPAA) et al. in Support of Appellee's Position Seeking Affirmance, 2005 WL 926824, at *6, Kahle v. Gonzales, 487 F.3d 697 (9th Cir. 2007) (No. 04-17434) ("Congress could have reasonably concluded that inadvertent forfeiture resulting from complex and technical renewal rules actually inhibited the dissemination of speech by interfering with copyright's incentives to produce expressive works, and that automatic renewal was necessary to protect free speech values.").

192. *See* Universal City Studios, Inc. v. Reimerdes, 82 F. Supp. 2d 211, 220 (S.D.N.Y. 2000) ("[The Supreme Court] has made it unmistakably clear that the First Amendment does not shield copyright infringement.").

193. *See supra* notes 77–81 and accompanying text.

194. Courts have upheld a provision of the DMCA, 17 U.S.C. § 512(h) (2000), that provides copyright owners with an expedited process for obtaining subpoenas ordering disclosure of the identities of alleged online infringers. For example, the U.S. District Court for the District of Columbia stated the following in *In re* Verizon Internet Servs., Inc., 257 F. Supp. 2d 244, 261 (D.D.C. 2003) :

> [T]he DMCA neither authorizes governmental censorship nor involves prior restraint of potentially protected expression. Section 512(h) merely allows a private copyright owner to obtain the identity of an alleged copyright infringer in order to protect constitutionally-recognized rights in creative works; it does not even directly seek or restrain the underlying expression (the sharing of copyrighted material).

Id.; *see also* Sony Music Entm't Inc. v. Does 1–40, 326 F. Supp. 2d 556, 567 (S.D.N.Y. 2004) (holding that the subpoena granted in the John Doe suit was constitutional because "defendants' First Amendment right to remain anonymous must give way to plaintiffs' right to use the judicial process to pursue what appear to be meritorious copyright infringement claims"). Courts have also upheld state statutes requiring distributors of recordings and audiovisual materials to place the name of the distributor on the goods. *See, e.g.*, Anderson v. Nidorf, 26 F.3d 100, 103 (9th Cir. 1994) ("Disclosure of the manufacturer . . . protects against piracy."); *see also* Brian McFarlin, *From the Fringes of Copyright Law: Examining California's "True Name and Address" Internet Piracy Statute*, 35 HASTINGS CONST. L.Q. 547, 564 (2008). These statutes are arguably analogous to a statute prohibiting removal or alteration of transactional watermarks.

artists and distributors of copyrightable expression.[195] In addition, the facilitation of personal and transformative copying that transactional watermarks provide, by lessening reliance on TPMs, also encourages expressive activities. These benefits would come with relatively minor privacy intrusions if a thoughtful approach to protecting watermarks is implemented. The Center for Democracy and Technology has proposed methods for including privacy protections such as notice to users of the presence of watermarks[196] within the design of transactional watermarks. Such privacy protections would best protect expressive values.

Finally, as already discussed, protecting transactional watermarks is related to the objective of the Copyright Clause because it facilitates enforcement of existing copyrights and thereby encourages creative expression. Justice Breyer said that a copyright statute is unconstitutional, or "clearly wrong," under the First Amendment if it is "difficult, if not impossible, even to dispute" that the statute fails all three parts of his test.[197] Clearly, it is easy to dispute that protecting transactional watermarks fails any one part, much less all three.

Nevertheless, some may argue that protecting transactional watermarks would be unconstitutional in certain circumstances. If legislation became law and a court was confronted with a specific case of an individual who removed a transactional watermark before creating a transforma-

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195. *See* Goldstein, *supra* note 33. Anecdotal evidence suggests that casual infringers are a far more prevalent threat to speech than over-protective copyright owners:

> For every songwriter, biographer or documentary maker who is mistakenly told that her use exceeds what the law considers fair or de minimis or what lies in the public domain, there is at least one other author who has been given a right but no practical remedy. . . . I would venture that the incidence of unrequited infringing uses outnumbers the incidence of unjustified demands by no less that a thousand to one.

Id. at 8.

196. *See generally* CTR. FOR DEMOCRACY AND TECH., *supra* note 27 (proposing methods for protecting privacy).

197. Eldred v. Ashcroft, 537 U.S. 186, 245 (2003) (Breyer, J., dissenting). One reading of Justice Breyer's dissent would see his three-part test as merely a tool for discovering obvious unconstitutionality rather than a test to determine constitutionality. Such a reading would distinguish between a circumstance in which a congressional choice is "clearly wrong" and a circumstance in which a congressional choice is unconstitutional. However, Justice Breyer took the words "clearly wrong" from *Helvering v. Davis*, 301 U.S. 619, 640 (1937), a Supreme Court opinion involving when Congress can tax and spend for the "general welfare." The reference to this opinion indicates that Justice Breyer sees copyright as an area in which the Court should defer to Congress unless Congress' decisions are "clearly wrong." Thus, Justice Breyer appears to have been equating a "clearly wrong" choice with an unconstitutional one.

tive work, would the court see the encouraging forest when confronted with the discouraged tree?

Robert Kasunic, among others, has suggested that courts may create a fair use doctrine of sorts applicable to the DMCA's TPM related anti-circumvention provisions if confronted with specific scenarios in which individuals circumvented TPMs in order to engage in journalism regarding corporate whistle blowing, for example.[198] Perhaps courts would pursue a similar path if confronted with a similar case involving removal of a transactional watermark. However, the adoption of such a path should at least be limited to actual acts of removal. If courts applied a limiting doctrine to prohibitions against distributing devices or services aimed at enabling removal of CMI, the exception would likely swallow the rule by providing every device distributor or service provider with a defense based on a hypothetical circumstance in which their devices or services enabled fair uses. If such arguments arise, courts should reject them, as they have in the TPM context.[199]

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198. *See* Kasunic, *supra* note 165, at 412. Professor Kasunic envisions the creation of a safe harbor for certain acts of free expression, like whistleblowing, that open societies need to protect:

> Looking to *Eldred* for guidance, it would appear that the optimal way to preserve the traditional contours of copyright so as to safeguard free speech values would be for a court to apply or expand the existing free speech safeguards, or, alternatively, to create an appropriate common law doctrine to address the conflict.

Id. at 413; *see also* Timothy K. Armstrong, *Fair Circumvention*, 74 BROOK. L. REV. (forthcoming 2008) ("[C]ourts are borrowing (and should borrow) factors and criteria that have developed under fair use en route to creating what I have labeled as the doctrine of 'fair circumvention' under the DMCA."); Jane C. Ginsburg, *The Pros and Cons of Strengthening Intellectual Property Protection: Technological Protection Measures and Section 1201 of the U.S. Copyright Act*, 16 INFO. & COMM. TECH. L. 191, 209 (2007). Professor Ginsberg argues that the courts must strike a delicate balance between protecting creative expression and allowing fair use:

> Absent evidence that the expanded intellectual property right cannot co-exist with free expression, courts should not introduce exceptions that eviscerate the statute, but recognition of the residual role of fair use in intellectual property law in general suggests that, in appropriate circumstances, courts may temper section 1201 with carefully tailored fair use-equivalent limitations.

Id.

199. *See, e.g.*, Macrovision v. Sima Products Corp., 81 U.S.P.Q.2d (BNA) 1923, 1924 (S.D.N.Y. 2006) ("Sima's defense that it only intends to enable 'fair use' copying of copyrighted works is no defense at all—as stated above, the DMCA provides no exception to its prohibition of the manufacture of these devices."). As Professor Denicola has argued:

VI. CONCLUSION

Transactional watermarks benefit copyright owners and users of copyrighted material by providing protections for authors and distributors while at the same time facilitating transformative and personal copying. Unfortunately, the law currently fails to provide adequate and effective protection for such watermarks. Congress should consider amending 17 U.S.C. § 1202 to explicitly prohibit the removal or alteration of transactional watermarks as well as dealing in devices or services aimed at enabling such removal or alteration. Doing so would encourage more expression than it would chill, and would be entirely consistent with the First Amendment and our engine of free expression, the Copyright Act.

> [A] device capable of circumventing technological protection for the purpose of fair use is usually also capable of circumventing for the purpose of infringement. Any generalized exception to the anti-trafficking rules would thus leave copyright owners vulnerable to the same threat of piracy that prompted the passage of the DMCA.

Robert C. Denicola, Access Controls, *Rights Protection, and Circumvention: Interpreting the Digital Millennium Copyright Act to Preserve Noninfringing Use*, 31 COLUM. J.L. & ARTS 209, 216 (2008).