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Thanks very much to the Case Western Reserve University School of Law, the organizers of this conference, and especially Professor Jacqueline Lipton for inviting me to participate. It seems amazing to me that ten years have already passed since the World Intellectual Property Organization ("WIPO") Treaties were adopted. I would like to think of myself as relatively new to this area, but once you start getting invited to retrospectives and you remember the enactment of the things being reflected upon, I think that sort of destroys that illusion. But I do think it is a good time for an assessment for where we are now. As the least international person on this panel, I am going to confine my comments to mostly the U.S. experience with the WIPO treaties. I will then spend some time at the end commenting on Ms. Hinze's excellent remarks.[1]

The WIPO treaties were adopted in 1996. Implementing legislation in the U.S., in the form of the Digital Millennium Copyright Act ("DMCA"), was passed in 1998.[2] And the anticircumvention provisions of the DMCA went into effect in 2000.[3] So, although it has been ten years since the WIPO treaties were adopted, the anticircumvention provisions of the DMCA have really been effective here in the U.S. for only six years. Nevertheless, I think that is enough time to see what effect that the law has had. There have been numerous lawsuits brought under the DMCA and there is enough material to begin, I think, at least an initial assessment about the effects.

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1 Gwen Hinze, *Ten Years Later: Reviewing the Impact of Policy Choices in the Implementation of the WIPO Internet Treaties' Technological Protection Measure Provisions*, 57 CASE W. RES. L. REV. 779 (2007).

2 Digital Millennium Copyright Act, 17 U.S.C. §§ 101–1205 (2000).

3 *Id.* § 1201.

There were a lot of predictions about the effects of the DMCA at the time it was adopted. Proponents believed it would help them stem the tide of copyright infringement. Detractors predicted harms to fair use and innovation. So the questions I am interested in asking are: How have these predictions fared? And, what can we say about the accuracy of these predictions at this point in time? I do not have any empirical data on this, so my reactions are based largely on anecdotal evidence, along with some of the reported opinions. I acknowledge that how you look at this depends very much on where you stand or sit, but I want to offer some thoughts toward an initial assessment.

I want to start, maybe counterintuitively, with the benefits of the DMCA. I know they do not get a lot of consideration and some may argue there are no benefits. But looking at the DMCA in its most favorable light, have these benefits come to pass ten years later or six years later, as the case may be? What are these benefits? The strong version of the benefits is the idea that the DMCA combined with digital rights management gives copyright owners extensive control over uses of their copyrighted works. In its strongest form, the idea is to lock up copyrighted works perfectly, make them invulnerable to copying, and also to enable copyright owners to charge for specific uses of the works and to engage in new business models.

There is also a slightly weaker version of the benefits. Maybe digital rights management does not lock up copyrighted works perfectly but, at the very least, it makes it more difficult for people to infringe. Some people are still able to circumvent but it is hard to get access to the technology. So, it prevents at least the lazy kind of infringer. It is a speed bump to keep people from infringing. Thus, the question is: How successful has it been?

I think it has been a pretty limited success. I think the one thing that the DMCA can be said to have done is keep commercial DVD copying devices and software from the broader market. When I think of concrete examples of how the world might have been different without the DMCA, I think we probably would have had a lot more broadly available software and devices to enable people to make private copies of their DVDs. For example, we might have had DVD backup devices and software, insulated largely by the *Sony* doctrine. I do think that the DMCA has had the effect of preventing this. And we have opinions like the *321 Studios* case[4] and the *Corley* case,[5] which essentially reinforced the view that these technologies are impermissible.

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[4] 321 Studios v. MGM Studios, 307 F. Supp. 2d 1085 (N.D. Cal. 2004).

[5] Universal City Studios v. Corley, 273 F.3d 429 (2d Cir. 2001).

The net effect is to prevent casual sharing of copies of DVDs among friends. Maybe there is a similar role with respect to music protected by digital rights management ("DRM"), although there is much more music that is not protected so it has had less of an effect. That is the one success I would point to as a really concrete result of the DMCA.

But that success, I think, is limited in a number of ways for at least two reasons. First, the technology is still available to those who are really determined. You can get access to the technologies, copies of software, and all the rest over the Internet. If you are really determined, the technology is out there. Second, and perhaps more fundamental, digital copies of movies are still available on the internet. You can download them through file sharing networks. There is no such thing as a perfect DRM system. Unprotected copies still leak out. In any event, people would be able to redigitize the analog signals anyway. And so to some extent, if perfect protection was the goal of the DMCA, then certainly that goal has not been satisfied.

So far, reading this most favorably, you could say that the DMCA has been successful in keeping casual consumers from sharing DVDs. But it has not been really successful in some of the more aggressive and broader claims about what it might do. This is not insignificant and might lead to a lot of extra sales for the movie industry. Also, as a cultural matter, the DMCA might prevent the widespread practice of sharing DVDs, which would reinforce, at least in the movie industry's view, public acceptance of an illegal and improper practice in the same way that music sharing is accepted. But the more aggressive claims of the DMCA's purported benefits have not been realized. Again, this is where we are now and in the future things might change.

But what about the costs? To some extent this overlaps with Ms. Hinze's article and I agree with much of what she discusses.[6] There were three main predictions, three categories of concerns about the DMCA. First, there was a concern that it would narrow the effective scope of fair use. Second, there was a concern that it would harm or slow technological innovation. And third, there was a concern that there might be some collateral impact on things such as speech and research.

So I will address these one at a time, taking first the impact on fair use. As Ms. Hinze noted, the DMCA does not have a broad fair use

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[6] Hinze, *supra* note 1.

exemption.[7] Instead, it replaces fair use with other mechanisms like the specific statutory exemptions and the Copyright Office's triennial rulemaking. It is hard to quantify the DMCA's impact on fair use because fair uses tend to be smaller scale uses. Either there are no lawsuits or the threats of lawsuits go unreported. It is certainly easy to come up with hypothetical situations where the DMCA would stand in the way of fair use. The classic example is a film studies professor who wants to use a clip of a DVD. He would be entitled to use the clip under fair use but cannot do so under the DMCA. There have been some anecdotal examples of problems with this; so, my belief is that the DMCA probably has had an impact on fair use but its impact is hard to assess.

The impact on innovation might be a little bit easier to assess because we do have more cases and more examples. New technologies and devices that interact with the DRM protected works are affected by the DMCA. If I want to create a device that plays or modifies protected content, any attempt to do that, to access the works, will lead to DMCA liability or the risk of it, and sales of the technologies may well violate the tools provision. There is a concern that this may prevent the creation of new and interoperable technologies. There are some cases of this involving the desire to make certain music formats playable on the iPod. There was the case involving Blizzard Technologies, their game software, and an attempt by third parties to create a service through which people could play Blizzard games online without having to use Blizzard service.[8] Again, these are interoperability/innovation cases that raise DMCA issues and might be problematic.

One interesting question is whether this is actually a problem or whether it is a sign of success. One could argue that this preventing of interoperability is actually not a bug but that it is actually a feature of the DMCA. Maybe the folks who have copyrights would say this is another sign of its success because it actually prevents others from creating interoperable products and services. But at least historically, as a copyright matter, interoperability was seen as something that was desirable, something that copyright owners could not prevent. And so, I tend to put this interoperability-inhibiting effect on the negative side of the balance.

And then, perhaps most problematically, there is the misuse of the DMCA outside its intended area to prevent competition in compatible hardware. Ms. Hinze discusses these cases—the garage door opener

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[7] *Id.* at 798–99.

[8] Davidson & Assocs., Inc. v. Jung et al., 422 F.3d 630 (8th Cir. 2005).

case[9] and the toner cartridge case,[10] to name a few—which are pretty clear examples of parties attempting to extend the DMCA beyond what Congress intended. Fortunately, the courts appear to have recognized this and have since scaled back on the scope of the DMCA. That has had the effect of greatly reducing some of the danger in that area, and thus, I think that is good news.

Finally, there are some concerns about the collateral effect of the DMCA on other things like encryption research and the reporting of security flaws. I think, in particular, Ms. Hinze's summary of the unintended consequences does a very nice job of highlighting exactly how the DMCA has that effect.[11]

In sum, I would say that there are many examples of these concerns about the DMCA and the negative impact of the DMCA playing out. I think there is a good deal of evidence of the negative impact. So we can say the record is quite mixed. There are some minimal benefits, but not extensive to date, and some pretty significant or at least nontrivial costs, such as areas of concern around competition and innovation. To some extent, doing this exercise is useful for me, because at the time the DMCA was being considered, I had significant concerns and doubts about it. Nothing that has happened in the last several years led me to change that view.

So where does this lead us? Ideally, I think it would lead to some reforms in the way the DMCA is structured. This leads to my response to Ms. Hinze's comments and suggestions about ways of implementing the obligations under these treaties in other countries.[12] From my perspective, they are interesting because they suggest possibilities of reform to our own DMCA. Now, it is probably unrealistic to expect any kind of reform to go through. But at least, they highlight ways in which, if we wanted to keep the DMCA and try to eliminate some of these costs while preserving whatever benefits the DMCA serves, we might be able to do that. I do very much appreciate that, and I think this idea of learning from the U.S. experience is a very important thing because I think the DMCA was drafted rather prematurely without any good idea of the types of technologies that it was intended to regulate. If you read the legislative history, there seems to be some confusion about exactly what the technology would look like. Some of the provisions of the DMCA reflect this confusion, and I think there is a lack of flexibility

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[9] Chamberlain v. Skylink, 381 F.3d 1178 (Fed. Cir. 2004).

[10] Lexmark v. Static Control, 387 F.3d 522 (6th Cir. 2004).

[11] Hinze, *supra* note 1, at 798–807.

[12] *Id.*

in the law that is problematic. So the idea would be that we would learn from this.

I think many of these proposals would make a lot of sense. It would be good to have broader and more extensive exemptions for reverse engineering, interoperability, and encryption research. I agree with Ms. Hinze that the existing exemptions tend to be very narrowly worded right now, and they do not give as much free room as we would like.[13] Also, it would be good to give greater flexibility to the Copyright Office to create exemptions. I think the way these parts of the DMCA are currently phrased have the effect of limiting what the Copyright Office can do and the efficacy of the exemptions process as a way of preserving some rights for users and individuals.

At the same time, I guess I do have some doubts about changes beyond the ones mentioned above and doubts about whether a more balanced version can effectively be struck. I really like the idea of creating more flexibility and privileges with respect to acts of circumvention, more room for fair use. It is harder for me to see how we can create this kind of flexibility with respect to devices. The question in my mind is how do we permit the marketing of the device that only allows fair uses of encrypted DVDs? I think that is really a tricky question because to some extent the choice is between either permitting decrypting technologies or not. There is an all or nothing aspect to the technology. Perhaps people are developing technologies that would be more fine-grained and allow certain types of uses. But I suspect the problem is not with the technology, but really with the U.S. conception of fair use, which has a kind of flexibility and open endedness. Other countries that have different, more limited privileges might not have as much of a problem.

It seems hard for me to think of a way of permitting this kind of flexibility without really gutting the tools provision. Now, personally, I would be fine with that. But it is hard to see how the copyright industry would agree with that. If you think about the DMCA, it is really about the tools provision, not about the access provision. And all the cases are about the tools provision and about the technology so it is hard for me to see kind of a more balanced version of that. But it would be great if we could construct a more flexible approach and maybe the experiences of other countries will show a way to do that. Perhaps they will actually be more sensitive to the need for flexibility, learn from the U.S. experience, and construct ways of doing this a lot more effectively.

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[13] *Id.*