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ARTICLES

A RIFF ON FAIR USE IN THE DIGITAL MILLENNIUM COPYRIGHT ACT

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[†] © 2000 by David Nimmer, Of Counsel, Irell & Manella, Los Angeles, California. This Article was initially presented as a paper to the Haifa Conference on the Commodification of Information on May 30, 1999. It is warmly dedicated to all my friends at Frimer & Gellman, at whose Jerusalem offices it was largely composed during what was supposed to be my sabbatical year—naturally, the very time that Congress chose to enact the Digital Millennium Copyright Act.

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INTRODUCTION

In late 1998, the United States Congress enacted its most sweeping revisions ever to the Copyright Act of 1976.¹ Under the title Digital Millennium Copyright Act,² this amendment institutes radical

¹ See David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. COPYRIGHT SOC'Y U.S. 401, 402 (1999) (describing the October 28, 1998 amendment as the most significant of the 32 amendments to the Copyright Act of 1976).

² Pub. L. No. 105-304, 112 Stat. 2860, § 1 (short title).

changes, from protecting boat hulls with *sui generis* rights,³ to permitting maintenance of computer systems without the consent of copyright owners whose software may, by chance, be copied in the process,⁴ to mandating respect for copyright management information.⁵

The most important feature of the Digital Millennium Copyright Act institutes anti-circumvention provisions into U.S. copyright law. The details of the resulting section 1201, added to the Copyright Act, are fiendishly complicated. Even without canvassing all of the nuances, however, a philosophical issue emerges—how does this amendment affect one of the cynosures of copyright law, its fair use doctrine? A full answer would require complete explication of both the Digital Millennium Copyright Act and of the fair use doctrine of U.S. copyright law.⁶ Even without such an ambitious program, some tentative steps into the terrain reveal interesting conclusions about the thrust of this massive amendment.

I. THE RIF

As we confront questions in the waning days of the millennium regarding the public policy of access and copying, it is instructive to examine how these issues were treated at the beginning of the millennium.⁷ Rabbi Isaac Al-fasi, known as the Rif,⁸ lived in North Africa in the eleventh century.⁹ At around the same time that William, Duke of

³ See *infra* Part III.B.2 (describing how the Act confers protection on the design of vessel hulls).

⁴ See 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.08[D] (release 50 1999) (permitting the copying of software for the sole purpose of maintenance and repair as long as the copy is used for no independent purpose and is destroyed immediately thereafter) [hereinafter NIMMER].

⁵ See 17 U.S.C. § 1202 (Supp. IV 1998) ("Integrity of copyright management information"). This issue, in addition to the anti-circumvention features discussed in this paper, is addressed in 3 NIMMER, *supra* note 4, ch. 12A.

⁶ See 3 NIMMER, *supra* note 4, § 12A.02 (examining the impact of the Act).

⁷ For an attempt to go even further back, see David Nimmer, *Adams and Bits: Of Jewish Kings and Copyrights*, 71 S. CAL. L. REV. 219 (1998), which examines copyright issues through an analysis of Biblical and Talmudic texts.

⁸ Perhaps a more exact English transliteration would be as follows: Ri"ḥ. The three letters represent the initials for Rabbi Isaac al Fasi (given that "al" is Arabic for "the," it drops out of the equation). The quotation mark in the middle signals to the Hebrew reader that the intent is to convey *rashei-teivot* [an acronym] rather than a real word. In English, such words as "NATO" are printed in capital letters (which Hebrew lacks) to make the same point.

⁹ Born in Algeria, his surname derived from his transplanted homeland in Fez, Morocco [Al-fasi = The Fezzite]. See 2 ENCYCLOPEDIA JUDAICA 600, 601 (1973) (providing a biography and explaining the derivation of his name). In 1088, he was forced to

Normandy, made headlines with his daring cross channel exploits,¹⁰ the Rif occupied himself with a photocopyright question:¹¹

Q. A student took books of sacred commentaries from a colleague. When asked to return them, he took a strict vow not to return them until such time as he could copy them. One rabbi permits this type of taking.

A. Both that rabbi and the student who took the books erred and did not act according to law. The rabbi who permitted the taking reasoned that this type of behavior is permitted, for it seemed to him that the student wanted to learn matters of Torah from the books, which qualifies as a *mitzva* [commanded, meritorious deed]. But he erred, for it is also written that "[a] stolen *lulav* [palm frond] is *pasul* [ritually unfit]." ¹² The Omnipresent detests a *mitzva* that emanates from sin, as it is written, "God loves righteousness, and hates thievery in its iniquity."

To unpack the reasoning of the *responsum*,¹³ the Rif calls attention to the fact that one who wants to wave a *lulav* on the holiday of Sukkot is also behaving meritoriously to fulfill a *mitzva*.¹⁴ That fact, however, does not give him the right to steal. Indeed, if he does steal someone else's *lulav* and proceeds to wave it, the stolen character of the *lulav* nullifies the *mitzva*. Precisely such nullification is the meaning, within the Jewish legal system, of something being *pasul*. In like measure, the meritorious intent of studying Torah cannot justify stealing someone else's book containing words of Torah because the very act of theft nullifies the otherwise meritorious character of the studying.¹⁵

In this *responsum*, we see two points of view expressed. The Rif himself accords primacy to property ownership—he rules that the owner of the book enjoys untrammelled rights in it and is unimpressed with contrary arguments founded on public policy.¹⁶ On the other hand, he acknowledges that his is not the only view. By expressing

flee to Spain, at age 75. See *id.* (explaining that he was denounced by enemies).

¹⁰ See, e.g., The Bayeux Tapestry, available at <<http://battle1066.com/baypart2.html>> (depicting the Norman conquest).

¹¹ *She'ailot uteshuvot haRi"ף*, number 133 (Hadar Linotyping & Pub. Co., 1954). All English translations are mine. I thank Rabbi Eliezer Kwass of Yeshivat Darché Noam in Beit Hakerem, Jerusalem, for introducing me to these materials.

¹² The full text of the section of the *mishnah* quoted within this passage states that "[a] stolen or dried up *lulav* is *pasul*." *Mishnah Succah* 3:1. For the Hebrew text and an additional English translation, see ART SCROLL MISHNAH SERIES, 3 MOED at Succah 3:1 (Nosson Scherman & Meir Zlotowitz eds., 1997).

¹³ A *responsum* is a formal answer to a religious question.

¹⁴ See *Leviticus* 23:40 (describing the commandment of assembling the *lulav*).

¹⁵ See *She'ailot uteshuvot haRi"ף*, *supra* note 11.

¹⁶ As we shall see, this point of view matches that of the House Judiciary Committee when initially deliberating the Digital Millennium Copyright Act. See *infra* text accompanying note 63 (recognizing the property rights of a copyright owner).

himself in opposition to an anonymous rabbi who ruled to the contrary, the Rif reveals that other currents swirl through these waters.¹⁷ It bears emphasis that the nameless rabbi with whom the Rif disagrees rules, as a legal matter, that the interests in accessing the contents contained in another's goods trump the property interests therein.

The great Sephardic rabbis of nine centuries ago were concededly vastly ahead of their contemporaries in Ashkenaz.¹⁸ But wisdom eventually migrated from Moslem Spain to Christian Germany. In addition, a technological revolution of inestimable importance to copyright transpired in the latter locale in the fifteenth century—the invention of the printing press.¹⁹ We therefore find similar copyright concerns radiating out to Poland in the sixteenth century.

To appreciate the context here, we must begin with an extract from the classic compendium of Jewish law, still in use to this day: the *Shulchan Aruch* [Set Table] written by the great Sephardic commentator, Rabbi Joseph Karo.²⁰

One who safeguards another's *Sefer Torah* [parchment scroll containing the Five Books of Moses] must roll it once every twelve months [to help preserve it²¹]. If, while rolling it, the bailee reads from it, that is permit-

¹⁷ As noted below, a welter of interests had to be satisfied before the Digital Millennium Copyright Act could be enacted. See *infra* Part II.A (discussing the necessity to balance and navigate competing interests).

¹⁸ Writing in thirteenth-century Provence, Shem Tov ben Joseph Falaquera commented, "Nowadays, it is sufficient for a man to read the *halakhot* [rulings] of Rabbi Alfasi of blessed memory, and along with them the books of our Rabbi Moses [Maimonides] of blessed memory . . ." MOSHE HALBERTAL, *PEOPLE OF THE BOOK: CANON, MEANING AND AUTHORITY* 106 (1997). (I take this opportunity to express my thanks to Moshe Halbertal for the opportunity to study with him at the Hartman Institute in Jerusalem.) Note that both rabbis Alfasi and Maimonides come from the Sephardic tradition, centered in Spain, as opposed to the later "Ashkenazim," whose tradition originated in Germany.

¹⁹ See ELIZABETH L. EISENSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE* 3-4 (1979) (commenting on the far-reaching effects of the invention of the printing press). That invention relates directly to the codifications of Jewish law discussed above. See HALBERTAL, *supra* note 18 (explaining that Ashkenazim began to codify texts to protect against printing errors). Note that the printing genie was too potent to be coaxed back into the bottle, although many and varied camps would have wished it so. See *id.* at 118 ("Opposition to printing the Zohar [a mystical text] came from two different camps [in sixteenth-century Italy]: one considered the Zohar to be a heretical text . . . ; the other perceived it as a sacred text which ought to be accessible only to the elite.").

²⁰ It should be noted that R. Karo's respect for the Rif bordered on reverence. See 2 *ENCYCLOPEDIA JUDAICA* 600, 603 (1973) (explaining that Karo determined the laws of the *Shulchan Aruch* on the Rif's authority).

²¹ The reason for the rolling is not made clear in the text itself. A commentator explains that rolling the parchment prevents it from deteriorating. See SHULCHAN

ted; but he must not open it for the express purpose of reading for his own benefit, as opposed to rolling it for the bailor's benefit. The same applies to other books. If the bailee opens and reads them for his own sake, he has invaded the domain of the bailment, and is liable.²²

The standard commentary on the *Shulchan Aruch* used by Ashkenazim is the *Mapa* [Tablecloth] which was composed by Rabbi Moses Isserlis,²³ known by the acronym Rema.²⁴ In this context, the Rema adds the following:

In the same way as it is forbidden to read from it, it is forbidden to copy a single letter from it. This ruling applies to the uneducated. But as to a sage, assuming he lacks that volume, he is permitted to read it and to copy from it. For such undoubtedly was the intent^[25] of the bailor.^[26] But in a place where Torah is lacking because books are unavailable, the tribunal can force someone to lend his books so that they can be studied, so long as he is recompensed for any wear and tear to the book that might occur in the process.²⁷

Here, we see a tremendous innovation. The lawmaking body,²⁸ according to the Rema, can intervene to remedy the lack of availability of a class of works.²⁹ As a systemic matter, the law can value the right

ARUCH, CHOSHEN MISHPAT, HILCHOT PIKADON 292:20, at Be'er Heitev commentary.

²² SHULCHAN ARUCH, *supra* note 21, at 292:20.

²³ The innovation of the printing press caused an "overabundance of opinions and their too facile dissemination." HALBERTAL, *supra* note 18, at 76. The codes of both R. Karo and R. Isserlis arose as a response. *See id.* at 76, 164 n.57. In particular, R. Isserlis departed "from the Ashkenazic tradition of not creating fixed codes" in response to the duplication of error that printing fostered. *Id.* at 164 n.57. As he wrote in Cracow in 1569, "Time perishes, and their words do not perish . . . and afterward these books themselves are printed and the one who reads them claims that they are all given in Sinai and rules according to them mistakenly, since those books are meant to be short and clear, and they distorted them." *Id.*

²⁴ Technically, the acronym should be written: Rem"a or Ram"a. As the latter formulation carries Hindu overtones to Anglophonic ears, this Article chooses the former.

²⁵ For a parallel construction of the doctrine of implied licenses, see David Nimmer, *Brains and Other Paraphernalia of the Digital Age*, 10 HARV. J.L. & TECH. 1, 20 (1996) (examining implicit licenses in copyright law).

²⁶ The logic here is that those in the stream of tradition who would prize owning a holy book in the first place must surely approve its dissemination to those imbued with the desire to study Torah.

²⁷ SHULCHAN ARUCH, *supra* note 22, at Rema commentary.

²⁸ Following the demise of the *Sanhedrin* [Rabbinic Parliament] in the fifth century, legislative as well as judicial power was vested in the *Beit Din* [court] as the authoritative body. Note that there are two interacting senses of the word "authority," and that they relate to the cognate of "author." *See* HALBERTAL, *supra* note 18, at 84-85.

²⁹ The parallel to the approach of the House Commerce Committee, ultimately adopted into law as part of the Digital Millennium Copyright Act, could not be more pronounced. *See infra* Part III.C.2.b (utilizing fair use principles to protect public ac-

of public access³⁰ to unavailable works more heavily than the property rights of the owners of those works. To phrase the matter in a modern idiom, when assertion of property rights would make a given class of works unavailable to the public who wishes to peruse them, then legislative redress is required.³¹

* *

Both the Rif and Rema were writing long before any country had enacted a copyright statute.³² It is hardly surprising to reflect that neither was attempting to vindicate copyright interests, in the sense of protecting the rights of authors.³³ Instead, their concern is with the property owner of the book in which the author's words had been embodied. Their writings reflect the tension between members of the public who have an interest in copying works and the owner of the tangible item sought to be copied. That tension arose because the legal system at the time of the Rif and the Rema attempted to reconcile disparate goals. All the players—the Rif, the rabbi with whom he disagrees, R. Karo, and the Rema—acknowledge the value of property ownership. They also recognize, as a fundamental good within their legal system, the inherent value of access to Torah and of the dissemination of the insights of Torah. To the extent that the players might reach disparate practical results, the difference stems from the contrasting ways in which each attempts to reconcile those competing interests.

The Rif stands for absolute property interests. Without disagree-

cess).

³⁰ Does it overstate matters to call this right "public" access? Should it be called "elite access," as the ruling is only for the benefit of the sage, rather than the public? The two categories that the Rema invokes are *am ha-aretz* [uneducated public] and *talmid chacham* [wise student, sage]. The former comprises a group who, given its lack of knowledge, would derive no benefit from access to works that its members would not be capable of reading. Thus, those members of "the public" who can benefit from this right fall within its penumbra, and the term "public access" is therefore appropriate.

³¹ See *infra* Part II.C.2.b (discussing § 1201's provision for rulemaking which leads to the publication of any class of copyrighted works for which noninfringing uses by adversely affected individuals are to be safeguarded).

³² See HARRY RANSOM, *THE FIRST COPYRIGHT STATUTE* 3-15 (1956) (detailing the establishment of the first copyright statute in 1710).

³³ The Rif juxtaposes thievery against robbery (*gezel* and *geneivah*). While it is tempting to translate his words as condemning both the wrong to the book owner via taking and the separate wrong to the copyright owner via copying, the language is too obscure—at least to this reader of his words—to have any confidence that such was his intent.

ing that there is independent value in access to Torah, he derides any notion that property rights can be sacrificed in the process. The Rif's opponent considers rights of public access as sometimes more fundamental than property ownership. Finally, there is the innovation championed by the Rema—of crafting new legal rules such that access trumps property.

Similar goals animated discussions in Congress of the Digital Millennium Copyright Act. All of the congressional players acknowledged the value of copyright as a species of intellectual property. All equally admitted that copyright's constitutional purpose is to promote the progress of "science,"³⁴ i.e., of disseminating knowledge. To the extent that contending forces championed different points of view, their differences stemmed from the way in which each sought to reconcile one social good against another.

As we will see below, the Rif's views were played out in the House Judiciary Committee when the Digital Millennium Copyright Act was first introduced. By the time that deliberations on the Digital Millennium Copyright Act had concluded, however, the viewpoint of the Rif's opponent had won universal support. Additionally, the House Commerce Committee adopted the Rema's suggested innovation early on. This point of view ultimately carried the day when the Digital Millennium Copyright Act was enacted into law. The question remains to be explored below how successfully that committee drafted the statutory language to meet its stated concern.³⁵

It is time, therefore, to move forward from the Rif and the Rema, in order to engage in an extended exploration of U.S. copyright doctrine as it has taken shape in the Digital Millennium Copyright Act. We will recur to them in evaluating the handiwork of their intellectual heirs.

II. THE DIGITAL MILLENNIUM COPYRIGHT ACT

The millennial hope underlying the Digital Millennium Copyright Act is to bring U.S. copyright law "squarely into the digital age."³⁶ As

³⁴ That noun is used *presciently* and *conscientiously* in its eighteenth century sense, as opposed to today's usage in contrast to the humanities. See 1 NIMMER, *supra* note 4, § 1.03 n.1 (noting that "in colonial usage 'science' referred to the works of authors").

³⁵ See *infra* Part III.B (evaluating Congress's attempts to safeguard fair use in § 1201).

³⁶ REPORT OF THE SENATE COMM. ON THE JUDICIARY, S. REP. NO. 105-190, at 2 (1998) [hereinafter S. REP. (DMCA)].

part of the ceaseless struggle to keep up with constantly evolving technology,³⁷ this law proposes to "make digital networks safe places to disseminate and exploit copyrighted materials."³⁸ By creating "the legal platform for launching the global digital on-line marketplace"³⁹ for copyrighted works," its goal is to "make available via the Internet the movies, music, software, and literary works that are the fruit of American^[40] creative genius."⁴¹

The primary battleground in which the omnibus Digital Millennium Copyright Act achieved this goal is its first title, the WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 (the "WIPO Treaties Act").⁴² This law brought U.S. copyright law into compliance with two treaties drafted at a Diplomatic Conference held in December of 1996.⁴³ The features discussed herein all appear in that first title of the new law. Foremost among them is the new section 1201 that the WIPO Treaties Act added to the Copyright Act of 1976.⁴⁴

A. Background—Regulation of Devices and Services

One of the most salient features of the Digital Millennium Copyright Act is that it serves several masters. In order to understand the thrust of the law, it is essential to appreciate Congress's concern with

³⁷ See *id.* at 2 ("Copyright laws have struggled through the years to keep pace with emerging technology from the struggle over music played on a player piano roll in the 1900's to the introduction of the VCR in the 1980's." (citations omitted)).

³⁸ *Id.*

³⁹ The law is designed not only to serve the goals of the online community. "It will also encourage the continued growth of the existing off-line global marketplace for copyrighted works in digital format by setting strong international copyright standards." *Id.* at 8.

⁴⁰ The portentously captioned "Digital Millennium Copyright Act," and its fixation on safeguarding "American creative genius," reflects the distinctive *zeitgeist* of "a people crazed with an appetite for information, w[ho] are natural Gnostics anyway." HAROLD BLOOM, *OMENS OF MILLENNIUM: THE GNOSIS OF ANGELS, DREAMS, AND RESURRECTION* 226 (1996).

⁴¹ S. REP. (DMCA), *supra* note 36, at 2.

⁴² Pub. L. No. 105-304, § 101, 112 Stat. 2860, 2861 (1998) (short title).

⁴³ For this observer's perspective as a participant at that Conference, see the WIPO Treaty Triptych: David Nimmer, *A Tale of Two Treaties*, 22 COLUM.-VLA J.L. & ARTS 1 (1997); David Nimmer, *Aus der Neuen Welt*, 93 NW. U. L. REV. 195, 196-97 (1998) (discussing copyright management information, "one of the web of copyright issues that [the world wide web] poses," and the innovation of the WIPO Copyright Treaty); and David Nimmer, *Time and Space*, 38 IDEA 501 (1998) (discussing various aspects of, and events taking place at, the 1996 Diplomatic Conference).

⁴⁴ 17 U.S.C. § 1201 (Supp. IV 1998).

balancing the interests of copyright proprietors, on the one hand, against the interests of the community of users, scholars, equipment manufacturers, and on-line service providers, on the other.⁴⁵

During its deliberations through sequential referral to diverse congressional committees,⁴⁶ the bill for the Digital Millennium Copyright Act progressed from one designed solely to protect copyright interests into a more broad-based redress of various aspects relating to digital commerce.⁴⁷ The introductory commentary from the House Commerce Committee discusses this phenomenon at length.

H.R. 2281 is one of the most important pieces of legislation affecting electronic commerce that the 105th Congress will consider. It establishes a wide range of rules that will govern not only copyright owners in the marketplace for electronic commerce, but also consumers, manufacturers, distributors, libraries, educators, and on-line service providers. H.R. 2281, in other words, is about much more than intellectual property. It defines whether consumers and businesses may engage in certain conduct, or use certain devices, in the course of transacting electronic commerce. Indeed, many of these rules may determine the extent to which electronic commerce realizes its potential.

The Committee on Commerce's role in considering this legislation is therefore critical. The Committee has a long-standing interest in addressing all issues relating to interstate and foreign commerce, including commerce transacted over all electronic mediums, such as the Internet, and regulation of interstate and foreign communications. This legislation implicates each of those interests in numerous ways.

⁴⁵ See *infra* Part III.A (discussing § 1201's various protections for fair use and its anti-circumvention bans).

⁴⁶ Even when reported out of the House Judiciary Committee, the bill was presented as a product of broadly supported compromises. See REPORT OF THE HOUSE COMM. ON COMMERCE, H.R. REP. NO. 105-551, pt. 2, at 22 (1998) [hereinafter COMMERCE REP. (DMCA)] (stating that the bill previously reported out by the Judiciary Committee was a "compromis[e]" that enjoyed "broad support"). Nonetheless, further hearings revealed that the bill "faced significant opposition from many private and public sector interests, including libraries, institutions of higher learning, consumer electronics and computer product manufacturers, and others with a vital stake in the growth of electronic commerce and the Internet." *Id.*

⁴⁷ The House Commerce Committee concluded that its revision to the bill previously reported on by the House and Senate Judiciary Committees "has appropriately balanced the interests of content owners, on-line and other service providers, and information users in a way that will foster the continued development of electronic commerce and the growth of the Internet." *Id.* at 21.

UNDERSTANDING THE NEXUS BETWEEN ELECTRONIC COMMERCE AND INTELLECTUAL PROPERTY

The debate on this legislation highlighted two important priorities: promoting the continued growth and development of electronic commerce; and protecting intellectual property rights. These goals are mutually supportive. A thriving electronic marketplace provides new and powerful ways for the creators of intellectual property to make their works available to legitimate consumers in the digital environment. And a plentiful supply of intellectual property—whether in the form of software, music, movies, literature, or other works—drives the demand for a more flexible and efficient electronic marketplace.⁴⁸

How can that balance be achieved? Historically, Congress has achieved the objectives of the Constitution's Copyright Clause "by regulating the use of information—not the devices or means by which the information is delivered or used by information consumers—and by ensuring an appropriate balance between the interests of copyright owners and information users."⁴⁹ The various provisions of the Copyright Act, on the one hand creating rights for proprietors but on the other hand delineating the scope of those rights,⁵⁰ have as a unifying theme the fact that they are all "technology neutral."⁵¹ That is to say, those laws

do not regulate commerce in information technology, i.e., products and devices for transmitting, storing, and using information. Instead, they prohibit certain actions and create exceptions to permit certain conduct deemed to be in the greater public interest, all in a way that balances the interests of copyright owners and users of copyrighted works.⁵²

New threats, however, sometimes necessitate new approaches. The Commerce Committee therefore concluded its examination by recognizing that

the digital environment poses a unique threat to the rights of copyright owners, and as such, necessitates protection against devices that undermine copyright interests. In contrast to the analog experience, digital technology enables pirates to reproduce and distribute perfect copies of

⁴⁸ *Id.* at 22-23.

⁴⁹ *Id.* at 24.

⁵⁰ See generally 2 NIMMER, *supra* note 4, §§ 8.01-8.24 (discussing the rights protected by copyright and their limitations).

⁵¹ COMMERCE REP. (DMCA), *supra* note 46, at 24.

⁵² *Id.* at 24.

works—at virtually no cost at all to the pirate. As technology advances, so must our laws.⁵³

The committee, therefore, incorporated anti-circumvention strictures into the WIPO Treaties Act.⁵⁴ Those strictures target not only bad acts (the activity of copying itself),⁵⁵ but also bad machines (devices that facilitate copying) and bad services (conduct that enables copying).⁵⁶ In this manner, copyright law expands its reach.

B. Section 1201's Anti-Circumvention Bans

Section 1201 separately defines three separate species of anti-circumvention violations—a basic provision, a ban on trafficking, and “additional violations.” The core is the “basic provision” that provides: “No person shall circumvent a technological measure that effectively controls access to a work protected under this title.”⁵⁷ The statute conditions this provision in numerous particulars, which form the bulk of the fair use discussion below.⁵⁸

The “ban on trafficking” provides as follows:

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

⁵³ *Id.* at 25.

⁵⁴ The irony is that the Commerce Committee desired to ensure that the Copyright Act (which occupies title 17 of the United States Code) itself would remain technology neutral and therefore “removed the anti-circumvention provisions from Title 17 and established them as free-standing provisions of law.” *Id.* As enacted, however, those provisions found their way back into title 17. See 17 U.S.C. § 1201 (Supp. IV 1998) (“Circumvention of copyright protection systems”).

⁵⁵ The basic provision of § 1201 targets in part such conduct. See *infra* Part II.B (discussing the basic anti-circumvention provision).

⁵⁶ The ban on trafficking and additional provisions of § 1201 are directed against such devices, as well as components of devices, services, and other targets. See *infra* Part II.B (discussing these provisions).

⁵⁷ 17 U.S.C. § 1201(a)(1)(A).

⁵⁸ See *infra* Part III.C (examining the policy rationale for the fair use aspects of § 1201).

(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.⁵⁹

The "additional violations" are almost identically worded:

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 protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;

(B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.⁶⁰

Given that the statutory terminology used for the foregoing two provisions differs only subtly—and given that the face of the statute itself reveals no clue as to which variant is aimed against what type of infraction—one must revert to the legislative history to gain an idea of Congress's intent in adopting the language of the statute.⁶¹

1. Breaking and Entering

The basic provision and the ban on trafficking appear together in

⁵⁹ 17 U.S.C. § 1201(a)(2).

⁶⁰ 17 U.S.C. § 1201(b).

⁶¹ The treaty language which these provisions aim to implement is not much more pellucid:

Contracting Parties shall 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 under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

Nimmer, *A Tale of Two Treaties*, *supra* note 43, at 17-18 (quoting WIPO Copyright Treaty, art. 11).

the same paragraph of the statute.⁶² The committee report comments that those two bans pertain "when a person has not obtained authorized access to a copy or a phonorecord of a work for which the copyright owner has put in place a technological measure that effectively controls access to his or her work."⁶³ In a more colloquial form: "The act of circumventing a technological protection measure put in place by a copyright owner to control access to a copyrighted work is the electronic equivalent of breaking into a locked room in order to obtain a copy of a book."⁶⁴

The basic provision, under this typology, is equivalent to breaking into a castle—the invasion inside another's property is itself the offense.⁶⁵ Note that the gravamen here is not copyright infringement.⁶⁶

⁶² See 17 U.S.C. § 1201(a).

⁶³ H.R. REP. NO. 105-551, pt. 1, at 17 (1998) [hereinafter H. REP. (DMCA)].

⁶⁴ *Id.* at 17.

[The WIPO Treaties Act] encourages technological solutions, in general, by enforcing private parties' use of technological protection measures with legal sanctions for circumvention and for producing and distributing products or providing services that are aimed at circumventing technological protection measures that effectively protect copyrighted works. For example, if unauthorized access to a copyrighted work is effectively prevented through use of a password, it would be a violation of this section to defeat or bypass the password and to make the means to do so, as long as the primary purpose of the means was to perform this kind of act. This is roughly analogous to making it illegal to break into a house using a tool, the primary purpose of which is to break into houses.

S. REP. (DMCA), *supra* note 36, at 11 (footnote omitted).

⁶⁵ "Paragraph (a)(1) establishes a general prohibition against gaining unauthorized access to a work by circumventing a technological protection measure put in place by the copyright owner where such protection measure otherwise effectively controls access to a work protected under Title 17 of the U.S. Code." H. REP. (DMCA), *supra* note 63, at 17-18.

⁶⁶ As Congress itself recognized, "these . . . provisions have little, if anything, to do with copyright law." COMMERCE REP. (DMCA), *supra* note 46, at 24. Instead, as 62 copyright law professors stated in a letter to Congress, they "represent an unprecedented departure into the zone of what might be called 'paracopyright.'" *Id.* at 24-25.

Although quoting the professors' terminology, Congress rejected the substance of their recommendation. See *id.* at 25. As to the enterprise of professors weighing in to Congress *en masse* about issues of legal concern, this review's pages have recently ventilated the wisdom of that device. Compare Neil Devins, *Bearing False Witness: The Clinton Impeachment and the Future of Academic Freedom*, 148 U. PA. L. REV. 165, 167 (1999) (noting that copyright reform is among many issues in which academics have written joint letters to Congress in recent years, and arguing that such a process undermines their credibility), with Cass R. Sunstein, *Professors and Politics*, 148 U. PA. L. REV. 191, 200 n.31 (1999) (disagreeing with Devins but explaining how his dog became newsworthy).

Turning to the substance of the professors' claim regarding "an unprecedented departure," those professors are undoubtedly correct in asserting that this zone represents a departure from traditional copyright interest. See Nimmer, *Aus der Neuen Welt*,

What of the trafficking ban? It targets not those who break into another's domain, but instead those who facilitate the process—say, those who market siege engines or catapults, devise ingenious infiltration strategies, and generally facilitate penetration of the stronghold.⁶⁷ This supplementary prohibition provides “meaningful protection and enforcement of the copyright owner’s right to control access to his or her copyrighted work.”⁶⁸ Building on previous doctrines of law outside the copyright arena (such as those barring manufacture of equipment to receive unauthorized cable television service⁶⁹ and decrypting cable programming),⁷⁰ the trafficking ban is “drafted carefully to target ‘black boxes,’ and to ensure that legitimate multipurpose devices can continue to be made and sold.”⁷¹ By its limited application to works that are designed for infringement or have only limited commercial significance other than to infringe, the ban on trafficking “is designed to protect copyright owners, and simultaneously allow the development of technology.”⁷² Thus, it is “not aimed at

supra note 43, at 204 (“[This feature] more closely resembles historic protection under the telecommunications law, or even more pointedly, the ‘Jesse James Act’ forbidding armed postal robbery, than it does the balance of Title 17.” (footnote omitted)). As to its being unprecedented, however, consideration of similarly extraneous amendments to the Copyright Act in 1984, 1992, and 1994 “show[s] that this departure is actually only too precedented.” 3 NIMMER, *supra* note 4, § 12A.17[B] n.14 (referencing Semiconductor Chip Protection Act of 1984, Audio Home Recording Act of 1992, and Uruguay Round Agreements Act).

⁶⁷ 17 U.S.C. § 1201(a)(1).

⁶⁸ H. REP. (DMCA), *supra* note 63, at 18; COMMERCE REP. (DMCA), *supra* note 46, at 38.

⁶⁹ The House Committee on Commerce and the Judiciary as well as the Senate Committee on the Judiciary all identified the need to couple prohibitions on circumventing copyright protection with prohibitions on the development of technologies intended to circumvent copyright protection. See COMMERCE REP. (DMCA), *supra* note 46, at 38 n.2 (citing 47 U.S.C. § 553(a)(2) (1994)); H. REP. (DMCA), *supra* note 63, at 18 (same); S. REP. (DMCA), *supra* note 36, at 11, 28 (same).

⁷⁰ See H. REP. (DMCA), *supra* note 63, at 18 (citing 47 U.S.C. § 605(e)(4) (1994)). Closer to home, it resembles the Copyright Act’s ban on digital audio tapes that fail to respect the serial copy management system (or equivalent techniques). *Id.* (citing 17 U.S.C. § 1002(a) (1994)). See 2 NIMMER, *supra* note 4, § 8B.03[B] (providing an overview of serial copy management technology).

⁷¹ H. REP. (DMCA), *supra* note 63, at 18; S. REP. (DMCA), *supra* note 36, at 29. The other House committee charged with evaluating the bill expressed itself, if anything, even more forcefully: “The Committee believes it is very important to emphasize that Section [1201](a)(2) is aimed fundamentally at outlawing so-called ‘black boxes’ that are expressly intended to facilitate circumvention of technological protection measures for purposes of gaining access to a work.” COMMERCE REP. (DMCA), *supra* note 46, at 38. It reiterates the same language as to the additional violations. *Id.* at 39 (restating the Committee’s interest in outlawing “black boxes”).

⁷² COMMERCE REP. (DMCA), *supra* note 46, at 39; H. REP. (DMCA), *supra* note 63, at 18; S. REP. (DMCA), *supra* note 36, at 29.

products that are capable of commercially significant noninfringing uses, such as consumer electronics, telecommunications, and computer products—including videocassette recorders,⁷³ telecommunications switches, personal computers, and servers—used by businesses and consumers for perfectly legitimate⁷⁴ purposes.”⁷⁵ Although such normal household devices lie outside the statute’s purview, a manufacturer cannot escape liability by “labeling . . . as a common household device” something primarily designed to infringe.⁷⁶

2. Disorderly Conduct

In contrast to invading the sanctity of another’s castle (the basic provision), if a guest invited inside the manor contravenes the seigneur’s edicts, then the trespass at hand differs qualitatively from breaking and entering.⁷⁷ Thus, the basic provision is inapplicable to “the subsequent actions of a person once he or she has obtained authorized access to a copy of a work protected under Title 17, even if such actions involve circumvention of additional forms of technological protection measures.”⁷⁸ Instead, the statute’s “additional violations” come into play here. They ban “circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner,”⁷⁹ a formulation parallel to the ban on trafficking,⁸⁰ albeit subject to slightly different definitions.⁸¹ Like that earlier ban,

⁷³ A later amendment to the bill aims, however, in sweeping fashion, at videocassette recorders. See 3 NIMMER, *supra* note 4, at § 12A.06 (discussing the Act’s “[r]egulation of [c]onsumer [a]nalog [d]evices”).

⁷⁴ See H. REP. (DMCA), *supra* note 63, at 10 (identifying legitimate purposes as including “obvious and numerous commercially significant purposes and uses other than circumventing such protections”).

⁷⁵ COMMERCE REP. (DMCA), *supra* note 46, at 38. As before, the committee reiterates the same language as to the additional violations. See *id.* at 39-40 (noting that the language also applies to the additional violations provision).

⁷⁶ H. REP. (DMCA), *supra* note 63, at 10.

⁷⁷ See *id.* at 19 (noting that subsection (b) applies when a person has obtained authorization to use a copy or a phonorecord, but limitations have been placed on further use of the copyrighted work).

⁷⁸ H. REP. (DMCA), *supra* note 63, at 18; see also S. REP. (DMCA), *supra* note 36, at 28.

⁷⁹ 17 U.S.C. § 1201(b)(1)(C) (Supp. IV 1998).

⁸⁰ H. REP. (DMCA), *supra* note 63, at 19 (describing ban on trafficking). The report notes that, like the ban on trafficking, the additional provisions are also “designed to protect copyright owners, and simultaneously allow the development of technology.” *Id.*

⁸¹ Compare 17 U.S.C. § 1201(a)(3) (defining the phrases “circumvent a technological measure” and “effectively controls access to a work”), with 17 U.S.C. § 1201(b)(2)

however, this one too "is designed to protect copyright owners, and simultaneously allow the development of technology."⁸²

3. Distinctions Between Those Schemes

Care must be taken to distinguish the ban on trafficking from the similarly worded additional violations.⁸³ According to the legislative history, "[t]he two sections are not interchangeable, and many devices will be subject to challenge only under one of the subsections."⁸⁴ As an example, however, the report offers not a concrete posture, but an obtusely worded restatement of the statute's effect.⁸⁵

The additional violations appear in their own statutory paragraph,⁸⁶ separate from the preceding paragraph of section 1201 that contains both the basic provision and the ban on trafficking.⁸⁷ The paragraph setting forth the additional violations contains nothing comparable to the basic provision. Accordingly, there is a marked contrast between the two schemes. As to prohibited *access*, the person engaging in that conduct has violated the basic provision; anyone assisting her through publicly offering services, products, devices, etc., to achieve the prohibited technological breach is separately culpable under the ban on trafficking. By contrast, a person who engages in prohibited *usage* of a work to which he has lawful access does not fall afoul of any provision of section 1201. It is only someone who assists him through publicly offering services, products, devices, etc., to

(defining "circumvent protection afforded by a technological measure" and "effectively protects a right of a copyright owner under this title").

⁸² COMMERCE REP. (DMCA), *supra* note 46, at 40; H. REP. (DMCA), *supra* note 63, at 19; S. REP. (DMCA), *supra* note 36, at 30.

⁸³ See S. REP. (DMCA), *supra* note 36, at 29 (noting that the trafficking and additional violations provisions should be considered separately).

⁸⁴ *Id.* at 12.

⁸⁵

[I]f an effective technological protection measure does nothing to prevent access to the plain text of the work, but is designed to prevent that work from being copied, then a potential cause of action against the manufacturer of a device designed to circumvent the measure lies under subsection 1201(b), but not under subsection 1201(a)(2). Conversely, if an effective technological protection measure limits access to the plain text of a work only to those with authorized access, but provides no additional protection against copying, displaying, performing or distributing the work, then a potential cause of action against the manufacturer of a device designed to circumvent the measure lies under subsection 1201(a)(2), but not under subsection 1201(b).

Id.

⁸⁶ See 17 U.S.C. § 1201(b).

⁸⁷ These violations are both set forth in 17 U.S.C. § 1201(a).

achieve the prohibited technological breach who becomes culpable under the additional violations.⁸⁸

The chart below helps to explain the taxonomy of section 1201.

Basic Provision	Trafficking Ban
<p>No person shall circumvent a technological measure that effectively controls access to a work protected by [United States copyright].</p>	<p>No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that is primarily designed or produced for the purpose of circumventing a technological measure that <i>effectively controls access to a work protected</i> under [United States copyright].</p>
	<p>Additional Violations</p> <p>No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that <i>effectively protects a right of a copyright owner</i> under [United States copyright] in a work or a portion thereof.</p>

Table 1—Taxonomy of Section 1201

⁸⁸ The legislative history notes that, “where a copy control technology is employed to prevent the unauthorized reproduction of a work, the circumvention of that technology would not itself be actionable under § 1201, but any reproduction of the work that is thereby facilitated would remain subject to the protections embodied in title 17.” S. REP. (DMCA), *supra* note 36, at 29. Accepting the claim that the later reproductions themselves would be subject to attack as copyright infringement, why would the threshold conduct “not itself be actionable under section 1201” as an additional violation? For that conduct circumvents “protection afforded by a technological protection measure that effectively protects a right of a copyright owner,” which was part of the bill even as then formulated. See *id.* at 86. The claim seems in error.

The upper half of this table represents the two features found in the first paragraph of section 1201. The basic provision sets forth a substantive offense, and the trafficking ban ensnares those who assist in violating the basic provision. The bottom half of the table represents the second paragraph of section 1201. In this context, section 1201 itself sets forth no basic ban; instead, that is the province of traditional copyright law. (For that reason, the lower left quadrant of the table remains blank.) However, the additional violations of section 1201 hold liable those who aid that underlying conduct by helping to circumvent technological measures.

Why is it that section 1201 is drafted, as the table illustrates, to set forth both an underlying basic provision and a complementary trafficking ban without any comparable underlying provision corresponding to its additional violations? The legislative history explains the rationale at work here:

[T]he reason there is no prohibition on conduct [as part of the additional violations] akin to the prohibition on circumvention conduct in [the basic provision is that the basic provision itself] is necessary because prior to this Act, the conduct of circumvention was never before made unlawful. The device limitation in [the ban on trafficking] enforces this new prohibition on conduct. The copyright law has long forbidden copyright infringements, so no new prohibition was necessary. The device limitation in [the additional violations] enforces the longstanding prohibitions on infringements.⁸⁹

Before concluding, a word of caution is in order about the castle conceit invoked throughout this discussion. Copyright is a right less absolute than the real property interests in one's domicile.⁹⁰ Although

⁸⁹ S. REP. (DMCA), *supra* note 36, at 12. Given the stark contrast in how the two paragraphs are drafted, it would be improper for a court to construe § 1201 to bar the unenumerated behavior of one who engages solely in prohibited usage of a work to which he has lawful access. That is the function, instead, of traditional copyright law. To the extent that that individual capitalizes on his success, however, by offering comparable services to the public, at that point he incurs liability under § 1201's additional violations. See 17 U.S.C. § 1201(b) (prohibiting the circumvention of technological protection).

⁹⁰ One witness testifying to Congress about the Digital Millennium Copyright Act related an example he had used to demonstrate to laymen the natural law underpinnings of copyright protection. He pointed to land cleared by the listener's great-grandfather, and invoked the moral equivalence of the heir's right to enjoy the fruits of that labor. See *WIPO Copyright Treaties Implementation Act; and Online Copyright Liability Limitation Act: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 168 (1997) (statement of John Bettis, songwriter on behalf of American Society of Composers, Authors and Publishers) [hereinafter 1997 Hearings, Serial No. 33]. The problem with that analogy is that it actually

the statute does not permit individuals initially to circumvent technological protective measures in order to break into the castle, i.e., to gain unauthorized access to the work,⁹¹ it nonetheless contains a "user exemption" to the basic provision that countenances such circumvention, even when initial access was unauthorized.⁹² In addition, once lawfully inside the castle, i.e., *vis-à-vis* a work that has been lawfully acquired, that individual may circumvent the protection measures pursuant to lawful conduct, such as to make fair use of the subject work.⁹³

C. Statutory Exemptions in Section 1201

1. General Exemptions

The vast bulk of section 1201 comprises its numerous exemptions. These apply for many specific purposes and are crafted with extreme complexity.⁹⁴ The discussion below gives content to some of these exemptions by comparing and contrasting them to the exemption for fair use, the primary focus of inquiry.⁹⁵

2. User Exemption

In adopting the WIPO Treaties Act, Congress evinced great solicitude for the role played by judicious application of the fair use doctrine.⁹⁶ That concern finds practical implementation in the instant

proves the opposite of the desired point. For copyrights, unlike real property, are time-limited; an heir typically has no right to enjoy royalties from a copyright four generations old. See 3 NIMMER, *supra* note 4, §§ 9.08-9.12 (discussing the duration of copyright protection).

⁹¹ See H. REP. (DMCA), *supra* note 63, at 17-18 (discussing the prohibition against circumventing technological protection measures employed by copyright owners).

⁹² See *infra* Part II.C.2 (discussing § 1201's user exemption provisions). To extend the metaphor, a constable armed with a warrant may invade a man's castle, even without the owner's consent. Section 1201 affords a user armed with a legitimate purpose under copyright law the same "police powers." Questions arise, however, as to how well this statutory scheme works in practice. See *infra* Part III.C.4 (examining the practical impact of the Act).

⁹³ See H. REP. (DMCA), *supra* note 63, at 18 (noting that an individual would be able to circumvent "in order to make fair use of a work which he or she has acquired lawfully"). For an expanded discussion of this issue, see *infra* Part III.C.

⁹⁴ For a full analysis, see NIMMER, *supra* note 4, § 12A.04, which discusses exemptions from anti-circumvention violations.

⁹⁵ See *infra* Parts II.D and III.A (discussing the statutory exemptions for fair use under § 1201).

⁹⁶ The House Commerce Committee discussed this issue at length. See COMMERCE REP. (DMCA), *supra* note 46, at 25-26, 37-38, 85-87 (discussing the role of fair use in the digital environment).

domain through a "fail-safe" mechanism.⁹⁷

a. *Theory*

To appreciate this mechanism, consider first how one can wax rhetorical about the great gains afforded by wide-scale access to copyrighted materials allowed by the Internet.⁹⁸

A plethora of information, most of it embodied in materials subject to copyright protection, is available to individuals, often for free, that just a few years ago could have been located and acquired only through the expenditure of considerable time, resources, and money. New examples of this greatly expanded availability of copyrighted materials occur every day.⁹⁹

An undertow looms, however, when one reflects that the tide can as easily fall as rise. Future marketplace realities could "dictate a different outcome, resulting in less access, rather than more, to copyrighted materials that are important to education, scholarship, and other socially vital endeavors."¹⁰⁰ Such waning of the public's access to important works could stem from evanescence of hard copies in a world of pan-electronic access, from embedding into those electronic files encryption devices (that might remain active long after copyright protection has ceased), from new business models that call for "restricting distribution and availability, rather than upon maximizing it," or from factors not yet in evidence on the horizon.¹⁰¹ Regardless of their provenance, the possibility of those scenarios calls forth the need to temper the categorical reach of the basic provision. As stated by the legislative history, it is "appropriate to modify the flat prohibition against the circumvention of effective technological measures that control access to copyrighted materials, in order to ensure that access

⁹⁷ See *id.* at 36 ("Given the threat of a diminution of otherwise lawful access to works and information . . . a 'fail-safe' mechanism is required."). Query whether, as implemented, the mechanism truly qualifies for that billing. See *infra* Part III.C.4 (examining how well § 1201 actually protects fair use).

⁹⁸

The growth and development of the Internet has already had a significant positive impact on the access of American students, researchers, consumers, and the public at large to informational resources that help them in their efforts to learn, acquire new skills, broaden their perspectives, entertain themselves, and become more active and informed citizens.

COMMERCE REP. (DMCA), *supra* note 46, at 35.

⁹⁹ *Id.* at 35-36.

¹⁰⁰ *Id.* at 36.

¹⁰¹ *Id.*

for lawful purposes is not unjustifiably diminished."¹⁰²

Toward that end, Congress devised an exemption for users.¹⁰³ In brief, this mechanism serves to "monitor developments in the marketplace for copyrighted materials, and allow the enforceability of the prohibition against the act of circumvention to be selectively waived, for limited time periods, if necessary to prevent a diminution in the availability to individual users of a particular category of copyrighted materials."¹⁰⁴ Implementation here depends on rulemaking undertaken pursuant to the Administrative Procedure Act.¹⁰⁵

b. *Application*

Having enunciated the basic provision,¹⁰⁶ section 1201 continues to specify that the ban does "not apply to persons who are users of a copyrighted work which is in a particular class of works."¹⁰⁷ The statute itself does not give direct content to its enigmatic reference to "a particular class of works."¹⁰⁸ But it does shed some light on that term insofar as it limits the foregoing release from the basic provision to the extent that "such persons are . . . adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under" U.S. copyright law.¹⁰⁹ The legislative history notes the obvious point that a "particular class of copyrighted

¹⁰² *Id.*

¹⁰³ As reported by the Judiciary Committee, the basic provision would have been absolute, with no solicitude for fair use. The Commerce Committee, however, reported out an amended bill that "creates a rulemaking proceeding in which the issue of whether enforcement of the regulation should be temporarily waived with regard to particular categories of works can be fully considered and fairly decided on the basis of real marketplace developments that may diminish otherwise lawful access to works." *Id.* The latter approach carried the day. See *infra* Part II.C.2.b (discussing the circumstances in which § 1201 does not apply).

¹⁰⁴ COMMERCE REP. (DMCA), *supra* note 46, at 36.

¹⁰⁵ See *id.* at 37 (stating that the determination as to whether to temporarily waive the anti-circumvention provision must be made in a "rulemaking proceeding[] consistent with the requirements of the Administrative Procedures [sic] Act").

¹⁰⁶ See 17 U.S.C. § 1201(a)(1)(A) (Supp. IV 1998) ("No person shall circumvent a technological measure that effectively controls access to a work protected under this title.")

¹⁰⁷ 17 U.S.C. § 1201(a)(1)(B).

¹⁰⁸ Though the Commerce Committee introduced this feature into § 1201, that precise phrase did not appear in its version of the bill. See COMMERCE REP. (DMCA), *supra* note 46, at 2-3 (giving the Commerce Committee's version of the bill). In addition, the conferees offer no explanation for the change. See H.R. CONF. REP. NO. 105-796, at 64-65 (1998) (discussing the conferees' view of § 1201(a)) [hereinafter CONF. REP. (DMCA)].

¹⁰⁹ 17 U.S.C. § 1201(a)(1)(B).

works" is narrower and more focused than all copyrightable works.¹¹⁰

It would seem, therefore, that the language should be applied to discrete subgroups. If users of physics textbooks or listeners to Baroque concerti, for example, find themselves constricted in the new Internet environment, then some relief will lie. If, on the other hand, the only problem shared by numerous disgruntled users is that each is having trouble accessing copyrighted works, albeit of different genres, no relief is warranted.

Even if the adverse effect—whether on textbook readers or any other discrete class—does not currently pertain, that situation may not remain static. Accordingly, the statute provides for various periods of evaluation. The release from the basic provision applies not only to currently disadvantaged users, but also to the extent that they are likely to suffer that adverse effect during the succeeding evaluation period.¹¹¹ The first relevant period runs from the date that the basic provision takes effect (the discussion below explains that it is held in abeyance until October 28, 2000) until two years thereafter (which translates to October 28, 2002).¹¹² During that window, a rulemaking procedure must take place, under the procedures described below. Thereafter, during each three-year period,¹¹³ a new rulemaking proceeding must take place.¹¹⁴

Considering first its bottom-line impact, each such rulemaking proceeding leads to publication of "any class of copyrighted works for which [the determination has been made] that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected."¹¹⁵ That publication makes the basic provision outlawing circumvention of technological measures inapplicable "to such

¹¹⁰ See COMMERCE REP. (DMCA), *supra* note 46, at 38 (stating that the particular class of copyrighted works is a narrow subset of works of authorship identified in 17 U.S.C. § 102).

¹¹¹ See 17 U.S.C. § 1201(a)(1)(B) (stating that the prohibition in subparagraph (A) will not apply to persons who are likely to be adversely affected in the succeeding three-year period).

¹¹² See *infra* Part II.C.2.c (discussing the two-year abeyance of the effective date).

¹¹³ The first period runs for two years from the effective date of the WIPO Treaties Act. See 17 U.S.C. § 1201(a)(1)(C). Thereafter, the relevant time is "each succeeding 3-year period." *Id.*

¹¹⁴ See *id.* (describing the procedures to be followed in "each succeeding 3-year period"); see also COMMERCE REP. (DMCA), *supra* note 46, at 37 ("[O]n each occasion, the assessment of adverse impacts on particular categories of works is to be determined *de novo*.").

¹¹⁵ 17 U.S.C. § 1201(a)(1)(D).

users with respect to such class of works."¹¹⁶ Thus, to continue the previous example, it may develop that users of physics textbooks are adversely affected by the new environment. If the evidence developed during the rulemaking procedure is insufficient to determine whether that adverse impact has taken place with respect to a particular class of copyrighted works, then the basic provision goes into effect *vis-à-vis* that class.¹¹⁷ Thus, equivocal evidence would prevent textbook readers from freely accessing their favorite work on physics. In any event, this safe harbor applies only during the three-year period to which the rulemaking culminating in publication pertains.¹¹⁸

Turning to methodology, the determination whether a person is likely to suffer an adverse effect under the statute, unlike most other aspects of copyright law, is not simply determined by a court called upon to adjudicate the operation of the statute. Instead, the statute directs the Copyright¹¹⁹ Office¹²⁰ to engage in "a rulemaking proceeding on the record."¹²¹ The statute enumerates five illustrative statutory factors¹²² to be considered in determining whether users of a copy-

¹¹⁶ *Id.*

¹¹⁷ See COMMERCE REP. (DMCA), *supra* note 46, at 38 ("If the rulemaking has produced insufficient evidence to determine whether there have been adverse impacts with respect to particular classes of copyrighted materials, the circumvention prohibition should go into effect with respect to those classes.").

¹¹⁸ See 17 U.S.C. § 1201(a)(1)(D) ("[T]he prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works for the ensuing 3-year period.").

¹¹⁹ The conferees rejected the Commerce Committee's earlier approach of vesting responsibility in the Secretary of Commerce, who, in turn, was to consult with the National Telecommunications and Information Administration. See COMMERCE REP. (DMCA), *supra* note 46, at 37.

¹²⁰ More specifically, the statute addresses "the Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation . . ." 17 U.S.C. § 1201(a)(1)(C). The Conference Committee asserted that:

[i]t is the intention of the conferees that, as is typical with other rulemaking under title 17, and in recognition of the expertise of the Copyright Office, the Register of Copyrights will conduct the rulemaking, including providing notice of the rulemaking, seeking comments from the public, consulting with the Assistant Secretary for Communications and Information of the Department of Commerce and any other agencies that are deemed appropriate, and recommending final regulations in the report to the Librarian.

CONF. REP. (DMCA), *supra* note 108, at 64.

¹²¹ 17 U.S.C. § 1201(a)(1)(C).

¹²² The statute directs the Librarian to examine the following factors:

(i) the availability for use of copyrighted works;
(ii) the availability for use of works for nonprofit archival, preservation, and

righted work mentioned above are indeed adversely affected¹²³ by the ban on technological circumvention "in their ability to make noninfringing uses under this title of a particular class of copyrighted works."¹²⁴ The legislative history instructs the rulemaking proceedings to focus on "distinct, verifiable and measurable impacts" that are not simply "*de minimis*," and to "solicit input to consider a broad range of evidence of past or likely adverse impacts."¹²⁵ It also directs that "[a]dverse impacts that flow from other sources, or that are not clearly attributable to implementation of a technological protection measure, are outside the scope of the rulemaking."¹²⁶

In addition to the departure from normal practice just noted, the scope of the rulemaking differs from most of the regulations promulgated by the Copyright Office or Librarian of Congress. Whereas most rulemaking administers only technical aspects of copyright law, the instant regulations take the additional step of exempting entire

educational purposes;

(iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;

(iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and

(v) such other factors as the Librarian considers appropriate.

Id. The last factor proves that the list is illustrative rather than exhaustive. Note that the absence of a comma after "nonprofit" in clause (ii) shows that it modifies each of the uses that follow.

¹²³ Alternatively, the statute directs the Librarian to inquire whether those users "are likely to be [adversely affected] in the succeeding 3-year period." *Id.*

¹²⁴ *Id.* The House Commerce Report explains some of the underlying goals here:

The goal of the proceeding is to assess whether the implementation of technological protection measures that effectively control access to copyrighted works is adversely affecting the ability of individual users to make lawful uses of copyrighted works. Many such technological protection measures are in effect today: these include the use of "password codes" to control authorized access to computer programs, for example, or encryption or scrambling of cable programming, videocassettes, and CD-ROMs. More such measures can be expected to be introduced in the near future. The primary goal of the rulemaking proceeding is to assess whether the prevalence of these technological protections, with respect to particular categories of copyrighted materials, is diminishing the ability of individuals to use these works in ways that are otherwise lawful.

COMMERCE REP. (DMCA), *supra* note 46, at 37.

¹²⁵ COMMERCE REP. (DMCA), *supra* note 46, at 37.

¹²⁶ *Id.* Further, the Report provides that "[i]n each case, the focus must remain on whether the implementation of technological protection measures (such as encryption or scrambling) has caused adverse impact on the ability of users to make lawful uses." *Id.*

categories of potential defendants from liability under the statute.¹²⁷ Therefore, to the extent that an aggrieved plaintiff believes that the Librarian of Congress has erred, it would seem that her sole remedy is to initiate a challenge to the rulemaking procedure pursuant to the Administrative Procedure Act,¹²⁸ rather than asking the court to determine that, under a judicious application of the pertinent factors, the defendant should be held culpable under the Copyright Act for an anti-circumvention violation.

It is legitimate to reverse the question. One may therefore inquire whether a defendant, whose usage failed to win recognition via the Librarian's publication, can nonetheless urge, as a defense to liability for an anti-circumvention violation under the Copyright Act, that his exploitation falls within the statutory safe harbor. The wording of the statute here opens the door for a court so inclined to evaluate the defendant's conduct and the effect of his using the subject work. If the factors for exemption are present, then that defendant, notwithstanding his failure to fall within the published regulations, may be able to prevail in arguing that he is exempt under the statute.¹²⁹

Apart from defending against a charge of an anti-circumvention violation, however, the statute directs that neither the exception from liability, nor the whole rulemaking procedure, shall constitute a defense for any purpose.¹³⁰ Thus, for example, a defendant whose usage

¹²⁷ See 17 U.S.C. § 1201(a)(1)(D) (Supp. IV 1998) ("[T]he prohibition contained in subparagraph (A) shall not apply to such users [identified pursuant to rulemaking] . . .").

¹²⁸ See 2 NIMMER, *supra* note 4, § 7.21[B] (discussing judicial review under the Administrative Procedure Act).

¹²⁹ The argument emerges from the language that Congress used: "Neither the exception under subparagraph (B) from the applicability of the prohibition contained in subparagraph (A), nor any determination made in a rulemaking conducted under subparagraph (C), may be used as a defense in any action to enforce any provision of this title other than this paragraph." 17 U.S.C. § 1201(a)(1)(E). From that wording, even a defendant who has failed to win publication under subparagraph (C), but who convinces a court that he qualifies for the exception under subparagraph (B), is forbidden from urging that status under any doctrine of U.S. copyright law "other than this paragraph." *Id.* The negative pregnant arises that he is allowed to urge the defense under this paragraph. That the paragraph in question contains the basic provision compels the conclusion that a defendant may urge his qualification under subparagraph (B), even absent publication under subparagraph (C), as a defense to a charge that he engaged in a wrongful circumvention of a technological measure. Militating against that construction, though, subparagraph (B) itself sets forth: "as determined in subparagraph (C)." 17 U.S.C. § 1201(a)(1)(B). A court attempting to reconcile these various provisions could seize on that language to reject the defendant's activist construction of the statute.

¹³⁰ See 17 U.S.C. § 1201(a)(1)(E) (restricting defenses).

wins exemption in pertinent rulemaking does not thereby gain any mileage in urging a fair use defense to copyright infringement,¹³¹ as opposed to a defense to the instant charge of violating the basic provision of section 1201.¹³² Likewise, a defendant who convinces the court that he falls within the exemption, even though not listed in the Librarian's published rules, should not be heard to make headway in any other feature of U.S. copyright law.

c. *Effective Date*

Although the basic provision is framed in absolute terms, the statute delays its implementation. In fact, the provision *ex proprio vigore* remains in abeyance for two years following enactment of the WIPO Treaties Act.¹³³ Therefore, the circumvention ban takes effect on October 28, 2000.

What was the reason for the delay? As we have just seen, the delay serves as a building block for the user exemptions.¹³⁴ The main purpose for the delay "is to allow the development of a sufficient record as to how the implementation of these technologies is affecting availability of works in the marketplace for lawful uses."¹³⁵

A separate issue arises in determining how long the protection lasts. Is circumvention of a technical process forbidden only so long as the work accessed thereby is subject to copyright protection, or does the prohibition continue longer? To appreciate this aspect of the matter requires an extended inquiry into the effective functioning of section 1201. After considering other aspects of the statute, the

¹³¹ Would that conclusion follow in any event, because of the independent provision that "[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title?" 17 U.S.C. § 1201(c)(1). It would seem so, indicating that Congress adopted a "belt and suspenders" approach here.

¹³² As previously noted, the field being plowed here is one of "paracopyright" rather than copyright proper. See *supra* note 66 (citing Congress's recognition of a "paracopyright" domain).

¹³³ The basic provision provides that it "shall take effect at the end of the 2-year period beginning on the date of enactment." 17 U.S.C. § 1201(a)(1)(A). Both the trafficking ban and additional violations sections lack comparable language. See 17 U.S.C. § 1201(a)(2), (b). The conclusion thereupon follows that this delay applies to only one of the three bans. See *infra* Part III.C.4.b (discussing the two-year delay in the anti-circumvention provision).

¹³⁴ See *supra* Part II.C.2.b (noting that the release from the anti-circumvention ban applies to persons likely to suffer adverse effects from October 28, 2000, and for three years thereafter).

¹³⁵ COMMERCE REP. (DMCA), *supra* note 46, at 37.

discussion below reverts to that inquiry.¹³⁶

D. *Separate Application of Each Exemption to Each Ban*

1. Brief Enumeration

As set forth above, section 1201 incorporates three anti-circumvention bans: the basic provision, the trafficking ban, and the additional violations.¹³⁷ To appreciate the context of the specific exemption protecting users' fair-use interests¹³⁸ requires explicating the distinctions among these three bans.

The discussion above has mentioned, in summary fashion, that the bulk of section 1201 sets forth in painstaking detail a host of exemptions applicable in various circumstances.¹³⁹ Although it goes beyond the scope of the current analysis to treat each exemption exhaustively, it is nonetheless telling to review them briefly and separately with regard to whether each exemption applies to one, two, or all three of the anti-circumvention bans.

(1) The exemption in favor of nonprofit libraries, archives, and educational institutions applies only to the basic provision.¹⁴⁰ It furnishes no defense to the trafficking and additional violations.

The upshot is that a library can obtain unauthorized access to a copyrighted work through this vehicle, but cannot manufacture or distribute devices or systems that either facilitate that access, or that take works to which access has been granted and defeat use restrictions put in place by the copyright owner.¹⁴¹

(2) The provision allowing for the deactivation of "cookies"¹⁴² likewise attaches only to the basic provision, rather than to the other two.¹⁴³ Even "if an engineer were to offer a service or component

¹³⁶ See *infra* Part III.C.4.a (considering application of the basic provision after the initial three-year period).

¹³⁷ See *supra* Part II.B (enumerating and discussing the three bans).

¹³⁸ See *supra* Part II.C.2 (delineating the theory, application, and effective date of the user exemption).

¹³⁹ See *supra* Part II.C.1. For a full-scale analysis of these various provisions, see 3 NIMMER, *supra* note 4, §§ 12A.04-12A.05.

¹⁴⁰ See 17 U.S.C. § 1201(d) (Supp. IV 1998) (providing that exempted institutions "shall not be in violation of subsection (a)(1)(A)").

¹⁴¹ 3 NIMMER, *supra* note 4, § 12A.04[A][1] (footnote omitted).

¹⁴² "Cookies" refer to client-side persistent information that allow a web site to learn information about you every time you log on." Nimmer, *Aus der Neuen Welt*, *supra* note 43, at 206.

¹⁴³ See 17 U.S.C. § 1201(f)(1) (providing exemption "[n]otwithstanding the provi-

whose sole function is to disable technological measures that intrude on users' privacy, [the lack of an exemption to the trafficking ban means that as] drafted, there is no protection for her."¹⁴⁴

The other exemptions in the statute are less parsimonious. (3) The exemption for law enforcement and intelligence gathering acts as an exception to section 1201 as a whole.¹⁴⁵ It therefore serves as a limitation on each of the three bans.¹⁴⁶

(4) One portion of the reverse engineering exemption applies to the basic provision.¹⁴⁷ A separate portion applies to the other two bans.¹⁴⁸ (5) One portion of the encryption exemption applies to the basic provision,¹⁴⁹ and another to the ban on trafficking.¹⁵⁰ There is, however, no exemption here from the additional violations. (6) By the same token, the exemptions for security testing apply to the basic provision and trafficking ban but not to the additional violations.¹⁵¹ (7) The same applies to section 1201's solicitude for minors.¹⁵²

2. Obligation to Discriminate

This summary reveals that some of section 1201's exemptions apply to the basic provision alone, others to this provision along with the trafficking ban, and others still to all three anti-circumvention bans. What systematic artifice is at work here, calling forth sometimes the need for an exemption to reach one ban, at other times two, and at still others three? Why is it that the reverse engineering exemption

sions of subsection (a)(1)(A)").

¹⁴⁴ 3 NIMMER, *supra* note 4, § 12A.05[B][1].

¹⁴⁵ See 17 U.S.C. § 1201(e) (applying the law enforcement exemption to all of § 1201).

¹⁴⁶ See 3 NIMMER, *supra* note 4, § 12A.04[B] ("[A]ll three anti-circumvention features . . . do not apply to such lawfully authorized governmental information security activities." (footnote omitted)).

¹⁴⁷ See 17 U.S.C. § 1201(f)(1) (allowing the exemption "[n]otwithstanding the provisions of subsection (a)(1)(A)").

¹⁴⁸ See 17 U.S.C. § 1201(f)(2) (providing an exemption "[n]otwithstanding the provisions of subsections (a)(2) and (b)").

¹⁴⁹ See 17 U.S.C. § 1201(g)(2) (creating the exemption "[n]otwithstanding the provisions of subsection (a)(1)(A)").

¹⁵⁰ See 17 U.S.C. § 1201(g)(4) (applying the exemption "[n]otwithstanding the provisions of subsection (a)(2)").

¹⁵¹ See 17 U.S.C. § 1201(j)(2) (providing exemptions "[n]otwithstanding the provisions of subsection (a)(1)(A)"); 17 U.S.C. § 1201(j)(4) ("[n]otwithstanding the provisions of subsection (a)(2)").

¹⁵² See 17 U.S.C. § 1201(h) (applying exception to "subsection (a)"). For some of the difficulties in applying that provision, see Nimmer, *Puzzles of the Digital Millennium Copyright Act*, *supra* note 1, at 405-12.

applies to the additional violations, but the corresponding one for encryption research does not? Why can companies traffic in anti-circumvention devices designed to facilitate security testing, but not those designed to facilitate library browsing? These global questions find no answer in either the statute itself or its legislative history.

Nonetheless, given the attention that has been paid to calibrating the scope of each exemption, Congress would certainly appear to have intended attention to precisely which ban is at issue in any given instance. In other words, just because a user's conduct falls within a statutory exemption does not mean that he can ignore all of section 1201. He is instead at liberty to ignore solely those particular bans to which his precise exemption applies.

Accordingly, courts should carefully apply each exemption solely to its specified reach—unless, perhaps, the very structure of the WIPO Treaties Act rebels at such a construction. Is there such an instance? The answer requires an extended inquiry into the statutory exemption designed to vindicate fair use.¹⁵³

III. FAIR USE

A. *General Solicitude for User Rights*

The thrust of section 1201, as explained above, is to create three anti-circumvention bans, in order to strengthen copyright proprietors.¹⁵⁴ Other portions of that same section, however, also protect fair use. One subsection is designed to ensure that the judicial extension of fair use to reverse engineering not be undercut.¹⁵⁵ Previous case law safeguards over-the-air taping of analog television programming as within the fair use doctrine;¹⁵⁶ another aspect of section 1201 ensures

¹⁵³ See *supra* Part II.C.2.b (discussing application of statutory exemptions in § 1201).

¹⁵⁴ See *supra* Part II.B. (explaining the three prohibitions on use).

¹⁵⁵ See *supra* notes 147-48 and accompanying text (describing 17 U.S.C. § 1201(f)'s protection of reverse engineering). On reverse engineering as fair use under previous law, see *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1520-21 (9th Cir. 1992), which held that reverse engineering was fair use under the Copyright Act of 1976. See generally 4 NIMMER, *supra* note 4, § 13.05[D][4] (describing reverse engineering and analyzing case law on the issue of whether it constitutes fair use). The Digital Millennium Copyright Act's attempt to continue that protected status in this realm is largely, though not completely, realized. See 3 NIMMER, *supra* note 4, § 12A.04[C][3] (describing the Digital Millennium Copyright Act's limitation of reverse engineering to interoperability, which is narrower than previous law).

¹⁵⁶ See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 454-55 (1984) (concluding that "home time-shifting is fair use").

the continuation of that interpretation as well.¹⁵⁷ Of course, given how large fair use looms in copyright doctrine,¹⁵⁸ it received extended discussion in the legislative history for section 1201, particularly in the Commerce Committee of the House of Representatives.¹⁵⁹ For that reason, the analysis below confronts it at length.¹⁶⁰

In addition to fair use, the WIPO Treaties Act contains other features safeguarding user rights. Notable among them are the following:

- The House Commerce Committee added to section 1201 solicitude for user privacy. Thus, websurfers may deactivate the “cookies”¹⁶¹ that would otherwise leave telltale crumbs as to their wanderings.¹⁶²
- It similarly added features to section 1201 to safeguard reverse engineering, encryption research, and security testing.¹⁶³
- The provision following section 1201, protecting copyright management information, likewise contains features designed to protect the privacy of users.¹⁶⁴
- The remedial provisions of the WIPO Treaties Act similarly evince a nuanced approach to copyright legislation. Most notably, the House Commerce Committee included a sensitivity that the First Amendment not be trampled when authorizing courts to enjoin violations of section 1201 and section 1202.¹⁶⁵

¹⁵⁷ See 3 NIMMER, *supra* note 4, § 12A.06[B] (explaining that § 1201(k)(1) allows consumers to make analog copies of programming, with some exceptions).

¹⁵⁸ The Supreme Court has handed down more rulings on fair use than on any other aspect of copyright law. See 4 NIMMER, *supra* note 4, § 13.05[B][3] (reviewing a number of Supreme Court decisions on the scope of the fair use doctrine).

¹⁵⁹ See *supra* note 96 (citing lengthy excerpts of the House Committee Report).

¹⁶⁰ See *infra* Part III.C (discussing “pay-per-use”).

¹⁶¹ See *supra* note 142 (defining “cookies”).

¹⁶² The legislative history itself underscores this point:

H.R. 2281, as reported by the Committee on the Judiciary, contains numerous protections to protect the rights of copyright owners to ensure that they feel secure in releasing their works in a digital, on-line environment. The Committee on Commerce, however, believes that in reaching to protect the rights of copyright owners, Congress need not encroach upon the privacy interests of consumers.

COMMERCE REP. (DMCA), *supra* note 46, at 27.

¹⁶³ See *supra* Part II.D.1 (enumerating the application of each exemption).

¹⁶⁴ See 17 U.S.C. § 1202(c) (Supp. IV 1998) (“[T]he term ‘copyright management information’ . . . does not include any personally identifying information about a user of a work . . .”).

¹⁶⁵ See 17 U.S.C. § 1203(b)(1) (Supp. IV 1998) (forbidding district courts to “im-

Simultaneously, other features of the Digital Millennium Copyright Act limit copyright owners' rights in order to preserve copyright law's delicate balance.¹⁶⁶ Countervailing Title I of the omnibus law (the WIPO Treaties Act), which in general expands the rights of copyright owners,¹⁶⁷ title II (the Online Copyright Infringement Liability Limitation Act) in general constricts those rights.¹⁶⁸

Other features of the Digital Millennium Copyright Act likewise demonstrate the same sensitivity. For instance, title III allows owners of computer systems to engage in repairs, over the objections of any software proprietor.¹⁶⁹ Title IV expands the interest of "libraries and archives to permit them to use the latest technology to preserve deteriorating manuscripts and other works."¹⁷⁰ The amendment's mandate for study of distance learning¹⁷¹ likewise manifests solicitude for the importance of user rights, as opposed to owner rights.¹⁷²

B. *Practical Implementations in the Digital Millennium Copyright Act Outside Section 1201*

The discussion above has addressed section 1201, which qualifies as the heart of the Digital Millennium Copyright Act.¹⁷³ As also noted,

pose a prior restraint on free speech or the press"); see also 3 NIMMER, *supra* note 4, § 12A.11[B] (discussing the ramifications of this limitation on the power to issue injunctions).

¹⁶⁶ For an extended ode to copyright law's "delicate balance," see David Nimmer et al., *The Metamorphosis of Contract into Expand*, 87 CAL. L. REV. 17 (1999).

¹⁶⁷ The matter is, of course, more complicated. Particular features of the WIPO Treaties Act itself serve the complementary interest of users rather than of copyright owners, as the discussion above explains.

¹⁶⁸ See 3 NIMMER, *supra* note 4, at ch. 12B (discussing in detail the effects of the Online Copyright Infringement Liability Limitation Act on previously existing copyright law).

¹⁶⁹ See 17 U.S.C. § 117(c) (Supp. IV 1998).

¹⁷⁰ COMMERCE REP. (DMCA), *supra* note 46, at 21; see also 17 U.S.C. § 108(c) (Supp. IV 1998) (providing that a library or archive may make a single copy of a published work if the sole purpose is to replace a damaged, deteriorating, lost, or stolen copy).

¹⁷¹ See Digital Millennium Copyright Act, Pub. L. No. 105-304, § 403, 112 Stat. 2860, 2889 (1998) (indicating that by six months from the passage of the Act, a report shall be submitted to Congress recommending how to promote distance education through digital technologies).

¹⁷² See COMMERCE REP. (DMCA), *supra* note 46, at 21 ("With these proposed revisions, the Committee believes it has appropriately balanced the interests of content owners, on-line and other service providers, and information users.").

¹⁷³ See *supra* Part II.

however, that enactment contains vastly greater features.¹⁷⁴ Adverting to two of these—one that explicitly adverts to section 1201, one that does not—helps set the stage for the amendment's contrasting treatment of threats to fair use from a "pay-per-use" world.¹⁷⁵

1. Ephemeral Recordings

The 1976 Act confronted the problem of ephemeral recordings: "[W]here a broadcaster has the privilege of performing or displaying a work either because he is licensed or because the performance or display is exempted under the statute, the question is whether he should be given the additional privilege of recording the performance or display to facilitate its transmission."¹⁷⁶ Given the practical exigencies of broadcasting, Congress adopted section 112(a) to exempt such ephemeral recordings from liability.¹⁷⁷

The Digital Millennium Copyright Act adds new weapons against the circumvention of technological measures.¹⁷⁸ With that addition to the copyright owner's arsenal, the ephemeral recording exemption could be rendered nugatory. Proprietors wishing to forestall reproduction could encrypt or otherwise protect their works, and then file suit under section 1201 against those who disabled that protection in order to reproduce the work as entitled via the ephemeral recordings exemption.¹⁷⁹ To deactivate that eventuality, the Digital Millennium Copyright Act itself adds a provision to the ephemeral recording exemption. The provision directs any copyright owner who employs technical measures preventing legitimate exercise of the ephemeral recordings exemption¹⁸⁰ to "make available to the transmitting organi-

¹⁷⁴ See *supra* Part III.A (canvassing aspects of the statute apart from § 1201).

¹⁷⁵ See *infra* Part III.C (analyzing impact of "pay-per-use" world).

¹⁷⁶ H.R. REP. NO. 94-1476, at 101 (1976).

¹⁷⁷ See 17 U.S.C. § 112 (Supp. IV 1998) (permitting broadcasters to make one copy of such a performance).

¹⁷⁸ See *supra* Part II.B (describing the three newly created anti-circumvention bans).

¹⁷⁹ The legislative history provides:

Concerns were expressed that if use of copy protection technologies became widespread, a transmitting organization might be prevented from engaging in its traditional activities of assembling transmission programs and making ephemeral recordings permitted by Section 112 for purposes of its own transmissions within its local service area and of archival preservation and security.

COMMERCE REP. (DMCA), *supra* note 46, at 67; S. REP. (DMCA), *supra* note 36, at 59; CONF. REP. (DMCA), *supra* note 108, at 78.

¹⁸⁰ See 17 U.S.C. § 112(a)(2) (1995), amended by Digital Millennium Copyright Act, Pub. L. No. 105-304, § 402(5), 112 Stat. 2860, 2888 (1998) (referring to "the applica-

zation the necessary means for permitting the making of such copy or phonorecord" as the exemption permits.¹⁸¹ This requirement, however, applies only "if it is technologically feasible and economically reasonable for the copyright owner to do so."¹⁸²

What if the copyright owner neglects to make the necessary means available? In that case, the statute does not provide a private right of action against that copyright owner. Instead, it affords self-help to the transmitting organization, specifying that it will not be liable for an anti-circumvention violation¹⁸³ "for engaging in such activities as are necessary to make such copies or phonorecords as permitted" under the ephemeral recordings exemption.¹⁸⁴ This remedy is triggered whenever the copyright owner fails to act "in a timely manner in light of the transmitting organization's reasonable business requirements."¹⁸⁵

What if technical measures are in place that prevent a transmitting organization from making the type of ephemeral reproduction that the statute allows and the copyright owner refuses to furnish the necessary means to make the subject copy—but the owner maintains that its reason for refusal is that compliance with the request would be economically unreasonable? Under these circumstances, the statute does not clearly address whether the stymied transmitting organiza-

tion by the copyright owner of technical measures that prevent the reproduction of the work").

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *See id.* (providing that transmitting organization "shall not be liable for a violation of section 1201(a)(1) of this title"). The cross-referenced section contains both the basic provision and the ban on trafficking, although not the additional violations. *See supra* Part II.B (articulating the extent of § 1201's protections).

¹⁸⁴ 17 U.S.C. § 112(a)(2). The legislative history sets forth an extended example:

By way of example, if a radio station could not make a permitted ephemeral recording from a commercially available phonorecord without violating section 1201(a)(1), then the radio station could request from the copyright owner the necessary means of making a permitted ephemeral recording. If the copyright owner did not then either provide a phonorecord that could be reproduced or otherwise provide the necessary means of making a permitted ephemeral recording from the phonorecord already in the possession of the radio station, the radio station would not be liable for violating section 1201(a)(1) for taking the steps necessary for engaging in activities permitted under section 112(a)(1). The radio station would, of course, be liable for violating section 1201(a)(1) if it engaged in activities prohibited by that section in other than the limited circumstances permitted by section 112(a)(1).

S. REP. (DMCA), *supra* note 36, at 59-60; CONF. REP. (DMCA), *supra* note 108, at 78-79; *see* COMMERCE REP. (DMCA), *supra* note 46, at 67 (discussing the radio station example).

¹⁸⁵ 17 U.S.C. § 112(a)(2).

tion can nevertheless engage in self-help.¹⁸⁶ On the one hand, the copyright owner has not done anything wrong, as its obligations cease when technological feasibility or economic reasonableness so dictate. On the other hand, disallowing the transmitting organization from acting under those circumstances causes it to lose the benefit of the ephemeral recording exemption through no fault of its own. For that reason, the better view would seem to be that the transmitting organization may respond to such intransigence, even if reasonable from the copyright owner's perspective, by engaging in self-help.¹⁸⁷

* *

This scheme furnishes one potential blueprint for application to section 1201. Congress could have extended to the anti-circumvention features a provision, like the one that it made applicable to ephemeral recordings, requiring a copyright owner who uses technical measures to subvert conduct authorized by the Copyright Act to provide the means to overcome that measure for parties acting within the scope of their rights. It could have clothed parties who found themselves stymied by overreaching on the part of content owners with self-help remedies, along the lines we have just observed in the instant context. Congress acted differently, however, when it came to fair use rights implicated by section 1201, as will be shown below.¹⁸⁸

2. Boat Hulls

In *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, a unanimous Supreme Court struck down a state law protecting the design of boat

¹⁸⁶ The statute allows self-help when "the copyright owner fails to do so in a timely manner." *Id.* (emphasis added). The question arises as to the referent of "so"—does it mean to "make available to the transmitting organization the necessary means for permitting the making of such copy or phonorecord?" *Id.* Or does it refer to doing so only "if it is technologically feasible and economically reasonable for the copyright owner to do so?" *Id.* The statute could be read to support either interpretation, giving rise to opposite conclusions.

¹⁸⁷ Presumably, the dispute would become operative only if such circumvention is technologically feasible and economically reasonable, *from the perspective of the transmitting organization*. Otherwise, it would be cheaper for that organization simply to forego the benefits of the ephemeral reproduction exemption, and the issue would never ripen into a concrete fact pattern.

¹⁸⁸ See *infra* Part III.C (discussing how the digital revolution places stress on the public's ability to browse published works).

hulls.¹⁸⁹ After that decision, designers of boat hulls were powerless to secure protection for their handiwork via state law.¹⁹⁰ To battle those "who indulge in a marine industry known as 'hull splashing,'"¹⁹¹ they turned instead to Congress for protection.¹⁹² Congress responded by enacting the Vessel Hull Design Protection Act,¹⁹³ Title V of the Digital

¹⁸⁹ 489 U.S. 141, 168 (1989) (striking down a Florida plug-molding statute, which prohibited the process by which a boat hull is made by casting a competitor's mold).

¹⁹⁰ Clearly, the Court did not view the absence of protection in this realm as a social evil begging for redress:

The duplication of boat hulls and their component parts may be an essential part of innovation in the field of hydrodynamic design. Variations as to size and combination of various elements may lead to significant advances in the field. Reverse engineering of chemical and mechanical articles in the public domain often leads to significant advances in technology. If Florida may prohibit this particular method of study and recomposition of an unpatented article, we fail to see the principle that would prohibit a State from banning the use of chromatography in the reconstitution of unpatented chemical compounds, or the use of robotics in the duplication of machinery in the public domain.

Id. at 160.

¹⁹¹ H.R. REP. NO. 105-436, at 10 (1998).

¹⁹² The congressional report offers only a few conclusory sentences on the economic rationale for this new scheme:

"Hull splashing" is a problem for consumers, as well as manufacturers and boat design firms. Consumers who purchase copied boats are defrauded in the sense that they are not benefitting from the many attributes of hull design, other than shape, that are structurally relevant, including those related to quality and safety. It is also highly unlikely that consumer [sic] know that a boat has been copied from an existing design. Most importantly for the purposes of promoting intellectual property rights, if manufacturers are not permitted to recoup at least some of their research and development costs, they may no longer invest in new, innovative boat designs that boaters eagerly await.

Id. at 13 (1998). An equally brief criticism is that if the concern here were truly safety, then Congress would have been better advised to address it directly rather than through the proxy of a new species of intellectual property (leading to further questions: Are splashed hulls invariably unsafe? Usually? Sometimes? Are unsplashed ones safe?). Additionally, if consumers are in fact purchasing the design that appeals to their eyes, it is unclear why their ignorance of copying diminishes their well-being.

As to the proper structure of economic incentives—the concern that, evidently, motivated Congress here—the report is remarkable for its failure to document the issue through citation to any empirical research. Congress evidently adopted the expedient of "legislate now, evaluate later." Rather than conducting an investigation into past effects, it directs a study as to the future impact of the Vessel Hull Design Protection Act. *See* Digital Millennium Copyright Act, Pub. L. No. 105-304 § 504(a), 112 Stat. 2860, 2917 (1998) (requiring the Register of Copyrights and the Commissioner of Patents and Trademarks to submit to Congress a joint report evaluating the effect of the 1998 amendments).

¹⁹³ Digital Millennium Copyright Act, § 501, 112 Stat. at 2905.

Millennium Copyright Act.¹⁹⁴ That amendment to the Copyright Act confers a circumscribed form of *sui generis* protection on designs, limited to the realm of boat hulls.¹⁹⁵

Infringing conduct under the Vessel Hull Design Protection Act consists of selling protected vessel designs without the consent of the owner or distributing them for sale or for use in trade.¹⁹⁶ Likewise, it is an infringement to "make, have made, or import for sale, or for use in trade, any [such] infringing article."¹⁹⁷

The Vessel Hull Design Protection Act contains special strictures for the liability of sellers and distributors. Assuming that she neither made nor imported the subject article, a seller or distributor is deemed to have infringed a protected design only if she "induced or acted in collusion with a manufacturer to make, or an importer to import, such article."¹⁹⁸ For these purposes, however, "merely purchasing or giving an order to purchase such article in the ordinary course of business shall not of itself constitute such inducement or collusion."¹⁹⁹

* *

This scheme furnishes another possible blueprint for section 1201. Congress could have crafted the anti-circumvention features, as it did for boat hulls, such that a party who is not the primary malefac-

¹⁹⁴ For a general discussion, see 2 NIMMER, *supra* note 4, §§ 8A.13-8A.21.

¹⁹⁵ See 17 U.S.C. § 1301(a)(2) (Supp. IV 1998) (stating that the design of a vessel hull is subject to protection under the Act).

¹⁹⁶ See 17 U.S.C. § 1309(a)(2) (prohibiting the sale, distribution, and use in trade of a protected vessel design).

¹⁹⁷ 17 U.S.C. § 1309(a)(1).

¹⁹⁸ 17 U.S.C. § 1309(b)(1). See H.R. REP. NO. 105-436 at 17 (1998) ("[A] seller or distributor will only be held liable if he or she colluded with a manufacturer or an importer to infringe . . .").

¹⁹⁹ 17 U.S.C. § 1309(b)(1). Although Congress crafted the previous provision to immunize sellers and distributors, it did not wish to allow them to flaunt design protection completely. Accordingly, a seller or distributor that refuses to make a prompt and full disclosure of its source for that infringing item, despite having been requested by the design's owner to do so, exposes itself to danger. See 17 U.S.C. § 1309(b)(2) (stating that a seller or distributor will be deemed an infringer if he "refused or failed, upon the request of the owner of the design, to make a prompt and full disclosure of that person's source of such article"). This exposure, however, matures into actual infringement liability only when the seller or distributor "orders or reorders such article after receiving notice by registered or certified mail of the protection subsisting in the design." *Id.*

tor²⁰⁰ attracts liability only if she "induced or acted in collusion with" that bad actor.²⁰¹ Once again,²⁰² however, Congress acted differently when it came to solicitude for the fair use rights implicated by section 1201 as will soon become apparent.²⁰³

C. *Reacting to a "Pay-Per-Use" World*

The discussion above delineates how section 1201 protects the rights of users in the digital environment.²⁰⁴ As previously noted, Congress purported to adopt a "fail-safe" mechanism safeguarding fair use.²⁰⁵ An evaluation of that policy safeguard is necessary to test whether it meets its billing.²⁰⁶

1. Background

Historically, copyright owners have always had the right to retain their works confidentially.²⁰⁷ "The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property."²⁰⁸ In this manner, United States law has accorded de facto recognition to the branch of moral rights called the *droit de divulgation*.²⁰⁹ Once those same owners consented to initial publication of the

²⁰⁰ In the context of the Vessel Hull Design Protection Act, the primary miscreant is one who made or imported the subject article. See 17 U.S.C. § 1309(b)(1) (stating that sellers or distributors infringe on a design when they are "induced or acted in collusion with a manufacturer to make, or an importer to import, such article . . ."). In the case of § 1201, the bad actor is the one who engages in the subject "breaking and entering" by gaining unauthorized access to a work which the copyright owner technologically shielded. See *supra* Part II.B.1 (discussing the act of "breaking and entering" by circumventing technological protection devices).

²⁰¹ See *supra* text accompanying note 198.

²⁰² See *supra* Part III.B.1 (discussing ephemeral recordings).

²⁰³ See *infra* Part III.C (discussing the fair use doctrine and the safeguarding of user access to restricted works in the context of § 1201).

²⁰⁴ See *supra* Part II.C.2 (discussing user exemptions to § 1201).

²⁰⁵ COMMERCE REP. (DMCA), *supra* note 46, at 36. See *supra* text accompanying note 97 (discussing H.R. REP. NO. 105-551).

²⁰⁶ Compare *supra* Part II.C.2.b (discussing the specific user exemption to users of a copyrighted work within a particular class of works), with *infra* Part III.C.4 (arguing that § 1201 does not properly protect user interests).

²⁰⁷ See 4 NIMMER, *supra* note 4, § 13.05[A][2][b] ("The scope of the fair use doctrine is considerably narrower with respect to unpublished works that are held confidential . . .").

²⁰⁸ Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

²⁰⁹ See 3 NIMMER, *supra* note 4, § 8D.05[A] ("The right [of the author to control initial dissemination] is nothing other than an American analog to France's *droit de*

work, however, they have historically lost control over its subsequent flow. The first sale doctrine prevented them from barring or demanding a royalty upon subsequent disposition of published copies.²¹⁰ The fair use doctrine prevented them from barring or demanding a royalty from such activities as miscellaneous quotations in the context of a review.²¹¹ In this manner, traditional copyright law accorded the public substantial leeway in browsing published works.²¹²

The digital revolution places unprecedented stress on those browsing activities.²¹³ Potentially, it allows copyright owners to control the flow not merely of their unpublished manuscripts,²¹⁴ but more importantly, of their published works as well.²¹⁵ If copyright owners package their "published"²¹⁶ goods in digital envelopes accessible only through passwords, then perhaps they can, indeed, levy a unilateral

divulgarion.").

²¹⁰ See 17 U.S.C. § 109 (1994 & Supp. IV 1998) (exempting transfer of a particular copy or phonorecord from the copyright owner's exclusive rights); 2 NIMMER, *supra* note 4, § 8.12[B] (discussing the first sale doctrine as embodied in § 109(a)).

²¹¹ See 17 U.S.C. § 107 (1994) (laying out the factors of fair use); 4 NIMMER, *supra* note 4, § 13.05[A] (discussing the factors of fair use).

²¹² In a future world of convergence, it is difficult to distinguish the various strands of traditional law, such as fair use, the first sale doctrine, and other matters, such as those inherent in the idea-expression dichotomy. Following the lead of the Copyright Office, "we will refer to all of these user privileges collectively as fair use interests." 1997 *Hearings*, *Serial No. 33*, *supra* note 90, at 48 n.1 (statement of Register of Copyrights Peters).

²¹³ See Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29 (1994) (discussing the possible fall-out of the view that the act of reading a work into a computer's random access memory creates a reproduction of that work, thereby infringing the copyright).

²¹⁴ Cf. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985) (holding that it is unfair, and therefore infringement, to copy an excerpt from President Ford's unpublished memoirs); *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987) (holding that it is not a fair use to quote lengthy excerpts from private letters of reclusive author), *cert. denied*, 484 U.S. 890 (1987).

²¹⁵ If the basic provision of § 1201 applied solely to unpublished works and the additional violations of § 1201 applied solely to published works, then all fair use concerns would evaporate, given that the additional violations are already structured to safeguard legitimate acts of fair use. See *infra* text accompanying note 236 (discussing S. REP. NO. 105-190, at 18). The problem, however, is that the basic provision can also apply to published but encrypted works. See 1997 *Hearings*, *Serial No. 33*, *supra* note 90, at 229 (statement of Rep. Frank) (stating his concern about the dissipation of the fair use doctrine to published works that are encrypted).

²¹⁶ Though that word may be anachronistic in the Internet context, the policy implications are not. See Nimmer, *Brains and Other Paraphernalia of the Digital Age*, *supra* note 25 (describing the distinction between published and unpublished works as a product of paper publication which will disappear with the coming of the electronic age unless deliberately maintained).

royalty upon such activities as resales and reviews.²¹⁷ At issue here are both factual and legal variables. The former involves a prediction as to the future of technology; the latter demands unprecedented attention to the legal status of such browsing activities as were previously simply beyond practical redress.²¹⁸

Consider the factual angle. Publishers are free to take old works that have fallen into the public domain, to add a bit of original material to them,²¹⁹ and to claim a copyright in the newly released whole.²²⁰ Thus, for example, they could collect all cookbooks published in the nineteenth century, write a new introduction to each, and then wrap the product in a digital envelope. The resulting product, considered as a whole, would be subject to copyright protection.²²¹ Whether that product holds any promise or not, however, depends on how technol-

²¹⁷ See 1997 Hearings, Serial No. 33, *supra* note 90, at 291 (statement of Rep. Lofgren) (discussing the possibility).

²¹⁸ Because the subject matter under discussion implicates so directly the first sale doctrine as applied to digital copies, it is relevant to inquire whether there exists such a thing as a "digital first sale defense," a matter subject to argument. See 144 CONG. REC. H7098 (daily ed. Aug. 4, 1998) (statement of Rep. Boucher, quoting letter from Chairman Coble) ("In my opinion, this extension of the first sale doctrine is antithetical to the policies the doctrine was intended to further."); Nimmer, *supra* note 216, at 9, 33 (posing this question); Nimmer et al., *The Metamorphosis of Contract into Expand*, *supra* note 166, at 39-40 (arguing for the existence of such a defense).

²¹⁹ Note that the standard for copyrightability is low. See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358 (1991) ("Originality requires only that the author make the selection or arrangement independently . . . and that it display some minimal level of creativity."); *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490-91 (2d Cir. 1976) (en banc) ("While a copy of something in the public domain will not, if it be merely a copy, support a copyright, a distinguishable variation will." (citing *Gerlaen-Barklow v. Morris & Bendien, Inc.*, 23 F.2d 159, 161 (2d Cir. 1927))).

²²⁰ See 17 U.S.C. § 101 (Supp. IV 1998) (defining "derivative work" as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version . . . or any other form in which a work can be recast, transformed, or adapted"). See generally 1 NIMMER, *supra* note 4, at ch. 3 (discussing derivative and collective works).

²²¹ Note that this copyright would not furnish any basis for protecting the underlying public domain materials standing by themselves. See 1 NIMMER, *supra* note 4, at § 3.04[A] ("[C]opyright in a derivative or collective work covers only those elements contained therein that are original with the copyright claimant. That is, a derivative or collected work copyright does not *per se* render protectible the preexisting or underlying work upon which the later work is based."). By promiscuously mixing unprotected with protectible material, however, the publisher may attempt to ratchet up its rights. Cf. *Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 674, 681 & n.4 (2d Cir. 1998) (involving a case in which a party "claimed some creativity in its corrections to the text of opinions" by selecting "parallel and alternative citations," and at one point claimed copyright protection on that basis over what otherwise would have been public domain judicial opinions), *cert. denied*, 119 S. Ct. 2039 (1999). This discussion evaluates the efficacy of those efforts.

ogy develops.

If lending libraries continue to flourish, then anyone with a burning interest in how shrimp was cooked in *fin de siècle* New Orleans could simply check out the relevant volume from her local repository. There is no reason for her to pay to access the digital product—unless she specifically wishes to read the newly composed introductions, as opposed to the underlying books.²²²

On the other hand, if the world develops such that a trip to the library becomes as common as sending messages via the Pony Express, then a different dynamic pertains. If access to works via electronic or photo-optical means becomes the universal norm, and if the only way that the pertinent network allows users to view any instantiation of Louisiana cookbooks of the 1890s is through payment of a fee, then royalties to the publisher of the electronic cookbook would become essentially mandatory.²²³ By the same token, if in tomorrow's world only antiquarians maintain phonographs and CD players, the sole effective way to hear an old recording of music might be through the same network service. To the extent that the service charged the same access fee for early 1920s jazz recordings as for new recordings subject to copyright protection, the effective result would be to convert public domain works into royalty-generating items.²²⁴

In short, depending on how the future unfolds, concern about fair use in the digital environment could range from pointless to vital. The latter scenario requires payment to gain access even to works that nominally lie in the public domain, such as works from centuries past, even if the purpose of the access is for one that the law favors, such as to quote a few sentences for scholarly purposes. Under that scenario, the work itself is effectively placed under lock and key, and the pro-

²²² Of course, to the extent that a user wants to review the copyrighted introduction, the law has every reason to validate charges that the copyright owner wishes to impose for that access.

²²³ This nightmare scenario includes “the elimination of print or other hard-copy versions, the permanent encryption of all electronic copies, and the adoption of business models that depend upon restricting distribution and availability, rather than upon maximizing it.” COMMERCE REP. (DMCA), *supra* note 46, at 36. For another view of the dangers, see Nimmer, *The Metamorphosis of Contract into Expand*, *supra* note 166, at 20-21, which offers a “Cautionary Tale” about the death of copyright in a completely wired world.

²²⁴ Note that as a matter of copyright duration, neither music nor sound recordings published in 1922 or earlier are entitled to any federal copyright protection. See 3 NIMMER, *supra* note 4, § 9.11[C] (stating that “all works that gained statutory copyright from January 1, 1923, onwards . . . now stand to remain subject to copyright protection until December 31, 2018, at the earliest”).

prietor can charge simply for the initial act of access. Thus arises what one senator calls "the specter of moving our Nation towards a 'pay-per-use' society."²²⁵

In turn, the legal issue arises of how to conceptualize the browsing activities of users in decades past.²²⁶ Why is it that reviewers could traditionally quote scattered passages from copyrighted works? Is it because they had a *right* to do so?²²⁷ Could chefs review the techniques of their predecessors as contained in published cookbooks of the past as a matter of *right*? If so, was the right of constitutional magnitude, safeguarding First Amendment interests of free speech and the advancement of knowledge?²²⁸ Or did the law simply allow those activities, as it would have been economically unproductive to pursue such small scale utilization?²²⁹

These fundamental questions exert practical consequences. Under the first point of view, any danger to the public's right to browse posed by the digital environment must be negated.²³⁰ In other words, if users have a constitutional right to quote for fair use purposes, then Congress was under an obligation to frame section 1201 in a manner that preserves that right.²³¹ Under the second point of view, by con-

²²⁵ 144 CONG. REC. S11887 (daily ed. Oct. 8, 1998) (statement of Sen. Ashcroft).

²²⁶ The legal questions actually run deeper. Before even reaching the fair use defense, how should one categorize the privileges that copyright law accords to authors themselves? To quote Macaulay's famous speech to the House of Commons on February 5, 1841, "Is this a question of expediency, or is it a question of right?" F. William Grosheide, *Dutch Copyright: Right or Expediency (1817-1912 and After)*, in *INTELLECTUAL PROPERTY AND INFORMATION LAW* 175, 176 (Jan J.C. Kabel & Gerard J.H.M. Mom eds., 1998).

²²⁷ See *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n.22 (11th Cir. 1996) (Birch, J.) ("Although the traditional approach is to view 'fair use' as an affirmative defense, this writer, speaking only for himself, is of the opinion that it is better viewed as a right granted by the Copyright Act of 1976.")

²²⁸ See generally 1 NIMMER, *supra* note 4, § 1.10 (discussing First Amendment limitations on copyright).

²²⁹ See Wendy J. Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1605 (1982) (arguing that finding of fair use is appropriate when market failure is present).

²³⁰ See Jonathan Dowell, *Bytes and Pieces: Fragmented Copies, Licensing, and Fair Use in a Digital World*, 86 CAL. L. REV. 843, 874-76 (1998) (arguing that use of copyright in the digital environment from an anti-dissemination motive should be subject to heightened fair use scrutiny). For an argument that public domain considerations are to be favored with respect to old works digitally exploited, see Robert Spoo, Note, *Copyright Protectionism and Its Discontents: The Case of James Joyce's Ulysses in America*, 108 YALE L.J. 633, 663-67 (1998), which states that the "public domain also promises a rich afterlife of unimagined creativity."

²³¹ Barney Frank constituted a one-man cheering section for the First Amendment during deliberation of the Digital Millennium Copyright Act. On the House floor, he

trast, the marketplace can be left to develop²³²—if browsing rights are extinguished in the process, the only lesson to derive is that the economics evidently have changed. Congress, under this viewpoint, need not embody into section 1201 any special solicitude for user rights.

How did Congress actually view the matter in deliberating the WIPO Treaties Act?²³³ The committees charged with deliberating the bill addressed the matter at length, as did many individual legislators.²³⁴

alone called attention to the technological progression of speech from books to radio to the Internet, and the need to evince sensitivity to speech in the new environment. See 144 CONG. REC. H7092 (daily ed. Aug. 4, 1998) (statement of Rep. Frank) (noting the technological progression and urging strong constitutional protection for electronically transmitted speech); see also *id.* H7101 (statement of Rep. Frank) (juxtaposing the Digital Millennium Copyright Act against Communications Decency Act, and condemning “danger in some other legislation of our continuing the unfortunate tendency of holding electronically transmitted speech to a lesser standard of protection”); 144 CONG. REC. H10618 (daily ed. Oct. 12, 1998) (statement of Rep. Frank) (“[W]e are developing a second line of law which says electronically-transmitted speech is not as constitutionally protected.”).

Note, however, that another speaker expressed similar concerns, but without explicitly invoking the First Amendment: “[T]hese protections from a permanent pay-per-view world ought to be maintained. Copyright is not just about protecting information. It’s just as much about affording reasonable access to it as a means of keeping our democracy healthy. . . .” *Id.* at H7094 (daily ed. Aug. 4, 1998) (statement of Rep. Bliley) (internal quotations omitted); See also Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996) (showing how copyright, through its encouragement of the production of “sustained works of authorship,” serves the underlying purposes of democracy); 1 NIMMER, *supra* note 4, § 1.10[A] n.2.1 (discussing the need to reconcile copyright and the First Amendment).

²³² Moreover, the marketplace does not exhaust the desiderata at issue here. See Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management,”* 97 MICH. L. REV. 462, 552, 558 (1998) (stating that creative works implicate preferences “that are fundamentally external to the market,” and drawing a distinction between maximizing the good of *citizens* as opposed to maximizing the good of *consumers*). See generally Netanel, *supra* note 231, at 288 (presenting “a conceptual framework for copyright that stands in opposition to both the expansionism of neoclassicist economics and the minimalism of many critics”).

²³³ It is not the task of this article to espouse a particular taxonomy (or to formulate a new one) as to where fair use rights lie in the hierarchy of values. Instead, the exercise here is to test Congress’s handiwork in the Digital Millennium Copyright Act against its self-stated goals.

By the same token, this Article does not purport to examine any outside forces that were brought to bear in the lobbying process of the Digital Millennium Copyright Act. Cf. Eben Moglen, *The Invisible Barbecue*, 97 COLUM. L. REV. 945, 948 (1997) (identifying “unarticulated assumptions . . . flying too low for our radar” that led to adoption of Telecommunications Act of 1996). Instead, this Article takes Congress’ pronouncements at face value and tests the extent to which they find realization in the language and structure of the statute.

²³⁴ The question at issue here arises not under international law, but solely as a matter of Congress’s drafting choices, as “the treaties themselves . . . give us all of the

2. Formulation by Congress

a. House Judiciary Committee

As reported by the House Judiciary Committee, the basic provision was intended to impose absolute liability against those who lack authorized access.²³⁵ It was only when the subject access was authorized that "the traditional defenses to copyright infringement, including fair use, would be fully applicable."²³⁶ The upshot is that fair use would apply only following lawful access, not as a basis for obtaining such access in the first instance. "[A]n individual would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of a work which he or she has acquired lawfully."²³⁷

* *

This point of view recognizes absolute property ownership. There is nothing inherently contradictory or illegitimate in the House Judiciary Committee's approach. Indeed, it enjoys an illustrious pedigree, tracing back to the resolution reached by the Rif at the beginning of

latitude that we need to protect our traditional legal approaches to the fair use doctrine." S. EXEC. REP. NO. 105-25, at 31 (1998) (statement of Alan P. Larson, Asst. Sec. of State for Economic and Business Affairs).

²³⁵ See *supra* note 103 (noting that the basic provision was absolute prior to the Commerce Committee's amendment).

²³⁶ H. REP. (DMCA), *supra* note 63, at 18.

²³⁷ *Id.* The Chairman of the subcommittee responsible for preparing this report elaborated on this point at some length, while explaining to Representative Boucher his reasons for rejecting that dissenter's proposed amendment. See 144 CONG. REC. H7097 (daily ed. Aug. 4, 1998) (statement of Rep. Boucher, incorporating letter from Chairman Coble) (discussing fair use and circumvention); see also *infra* Part III.C.2.b (discussing the views of the House Commerce Committee). Explaining that the WIPO Copyright Act deals separately with technological measures preventing access and with those preventing copying, the chairman noted that with respect to the latter alone "the bill contained no prohibition on the act of circumvention [sic] itself, leaving users free to circumvent such measures in order to make fair use copies." 144 CONG. REC. H7097 (daily ed. Aug. 4, 1998) (statement of Rep. Boucher, incorporating letter from Chairman Coble). He also explained his concern that Representative Boucher's amendment

would grant to users a right never before allowed—free access to copyrighted works in order to make a fair use. I believe this is unwise policy and tilts the balance away from the protection of works in a free market economy toward the free provision of works to anyone claiming to make a fair use.

Id. at H7098.

this millennium.²³⁸ But given that other voices ultimately prevailed, it remains necessary to test Congress's handiwork against those disparate approaches.

b. *House Commerce Committee*

The House Commerce Committee devoted considerable attention to the perceived dangers in the approach of its sister committee.²³⁹ Its concern was that the basic provision of section 1201, as originally drafted by the Clinton administration²⁴⁰ and reported out by the Judiciary Committee,²⁴¹ would threaten to "lock up"²⁴² works falling within the scope of its protection.²⁴³ Its words are worth quoting at length.

Writing under the heading "Fair Use in the Digital Environment," the Report begins by quoting a popular newspaper account of this seemingly esoteric matter of copyright doctrine.²⁴⁴

²³⁸ See *supra* Part I (discussing the Rif).

²³⁹ "The Committee on Commerce devoted substantial time and resources to analyzing the implications of this broad prohibition on the traditional principle of 'fair use.'" COMMERCE REP. (DMCA), *supra* note 46, at 25.

²⁴⁰ The early groundwork for the Digital Millennium Copyright Act was laid by the administration's Information Infrastructure Task Force. See S. Rep. (DMCA), *supra* note 36, at 2-3 (discussing the legislative history). This Task Force created a Working Group on Intellectual Property Rights, see *id.* at 2 (noting the creation of a working group), which convened the "Conference on Fair Use (CONFU) to explore the particularly complex issue of fair use in a digital environment and to develop guidelines for uses of copyrighted works by librarians and educators." *Id.* at 3. Those efforts, however, proved inconclusive. See *id.* at 68 (Additional Views of Sen. Leahy) ("CONFU has so far been unable to forge a comprehensive agreement on guidelines for the application of fair use to digital distance learning.").

²⁴¹ "[The Commerce] Committee was concerned that H.R. 2281, as reported by the Committee on the Judiciary, would undermine Congress' long-standing commitment to the principle of fair use." COMMERCE REP. (DMCA), *supra* note 46, at 35.

²⁴² The phrase is that of Representatives Klug and Boucher, whose views are treated below. See *infra* Part III.C.2.c (discussing their initial disagreement with the Commerce Committee's report).

²⁴³ At that stage of the bill's development, § 1201(a) provided simply that "[n]o person shall circumvent a technological protection measure that effectively controls access to a work protected under Title 17, United States Code." COMMERCE REP. (DMCA), *supra* note 46, at 25. Essentially the same language survived to enactment—but only in the context of a two-year delay and an exception for adversely affected classes. See *supra* Parts II.C.2.b, II.C.2.c (discussing the application and effective date of § 1201). On the significance of those alterations, see *infra* Part III.C.4.

²⁴⁴ Likewise, a later statement from the Chairman of the Commerce Committee appends editorials from the *New York Times* and the *Washington Post*, decrying the specter of "A Pay-Per-View World." 144 CONG. REC. H7093 (daily ed. Aug. 4, 1998) (statement of Rep. Bliley).

A recent editorial by the Richmond Times-Dispatch succinctly states the Committee's dilemma:

Copyrights traditionally have permitted public access while protecting intellectual property. The U.S. approach—known as “fair use”—benefits consumers and creators. A computer revolution that has increased access to information also creates opportunities for the holders of copyrights to impose fees for, among other things, research and the use of excerpts from published works. And digital technology—whatever that means—could be exploited to erode fair use.

The principle of fair use involves a balancing process, whereby the exclusive interests of copyright owners are balanced against the competing needs of users of information. This balance is deeply embedded in the long history of copyright law. On the one hand, copyright law for centuries has sought to ensure that authors reap the rewards of their efforts and, at the same time, advance human knowledge through education and access to society's storehouse of knowledge on the other. This critical balance is now embodied in Section 106 of the Copyright Act (17 U.S.C. § 106), which grants copyright holders a “bundle” of enumerated rights, and in Section 107, which codifies the “fair use” doctrine . . .

Fair use, thus, provides the basis for many of the most important day-to-day activities in libraries, as well as in scholarship and education. It also is critical to advancing the personal interests of consumers. Moreover, as many testified before the Committee, it is no less vital to American industries, which lead the world in technological innovation. As more and more industries migrate to electronic commerce, fair use becomes critical to promoting a robust electronic marketplace. . . .^[245]

The Committee was therefore concerned to hear from many private and public interests that H.R. 2281, as reported by the Committee on the Judiciary, would undermine Congress' long-standing commitment to the concept of fair use. A June 4, 1998, letter to the Committee from the Consumers' Union is representative of the concerns raised by the fair use community in reaction to H.R. 2281, as reported by the Committee on the Judiciary. The letter states in part:

These newly-created rights will dramatically diminish public ac-

²⁴⁵ Elsewhere, the Committee concluded, “[t]hroughout our history, the ability of individual members of the public to access and to use copyrighted materials has been a vital factor in the advancement of America's economic dynamism, social development, and educational achievement.” *COMMERCE REP. (DMCA)*, *supra* note 46, at 35.

cess to information, reducing the ability of researchers, authors, critics, scholars, teachers, students, and consumers to find, to quote for publication and otherwise make fair use of them. It would be ironic if the great popularization of access to information, which is the promise of the electronic age, will be short-changed by legislation that purports to promote this promise, but in reality puts a monopoly stranglehold on information.

The Committee on Commerce felt compelled to address these risks, including the risk that enactment of the bill could establish the legal framework that would inexorably create a "pay-per-use" society. At the same time, however, the Committee was mindful of the need to honor the United States' commitment to effectively implement the two WIPO treaties, as well as the fact that fair use principles certainly should not be extended beyond their current formulation. The Committee has struck a balance that is now embodied in Section [1201](a)(1) of the bill, as reported by the Committee on Commerce. The Committee has endeavored to specify, with as much clarity as possible, how the right against anti-circumvention would be qualified to maintain balance between the interests of content creators and information users. The Committee considers it particularly important to ensure that the concept of fair use remains firmly established in the law. Consistent with the United States' commitment to implement the two WIPO treaties, H.R. 2281, as reported by the Committee on Commerce, fully respects and extends into the digital environment the bedrock principle of "balance" in American intellectual property law for the benefit of both copyright owners and users.²⁴⁶

* *

As we have seen, legal systems can grapple with these issues through a variety of means.²⁴⁷ The viewpoint just quoted at length stands in marked contrast to the property-maximizing view of the Judiciary Committee. The Commerce Committee views public access to works of authorship as an independent good deserving of legal recognition.²⁴⁸ As such, the House Commerce Committee is heir to the

²⁴⁶ COMMERCE REP. (DMCA), *supra* note 46, at 25-26 (citations omitted).

²⁴⁷ See *supra* Part I (confronting the Rif's photocopyright *responsum*).

²⁴⁸ The Digital Future Coalition addressed the limitations placed on copyright protection in the interest of "fair use" and promotion of science and the useful arts:

The United States is not a leader in international information commerce despite the balanced character of our traditional copyright law, but because of it. Indeed, it is the compromise of interests struck in U.S. law . . . that has enabled our country's artistic, scientific, and educational achievements, and provided the basis for the emergence of our internationally dominant copyright and high technology industries.

Rif's rival.²⁴⁹ As we shall see in the unfolding discussion, it is this view that ultimately held sway in Congress.

c. *Dissenting Viewpoint*

Although the foregoing excerpt concludes that the Commerce Committee's alterations achieved balance, two members of the Committee took exception.²⁵⁰ Representatives Scott Klug and Rick Boucher began by disagreeing vehemently with the Judiciary Committee's draft and then proceeded to note their reservations even with the Commerce Committee's purportedly balanced formulation:

In its original version, H.R. 2281 contained a provision that would have made it unlawful to circumvent technological protection measures that effectively control access to a work, for any reason. In other words, the bill, if passed unchanged, would have given copyright owners the legislative muscle to "lock up" their works in perpetuity—unless each and every one of us separately negotiated for access. In short, this provision converted an unobstructed marketplace that tolerates "free" access in some circumstances to a "pay-per-access" system, no exceptions permitted.

In our opinion, this not only stands copyright law on its head, it makes a mockery of our Constitution. . . .^[251]

S. REP. NO. 105-25, at 46 (1998) (statement of Peter Jazsi, Professor of Law, Washington College of Law, The American University).

²⁴⁹ Why did the Rif even bother to cite a rival viewpoint, instead of simply pronouncing his own conclusion apodictically? Granted that disagreement is inevitable, in law as well as in every other human sphere, still it is the majority rule that is binding—so why should the losing voice even be recorded? That question arises even more pointedly with respect to the *Mishnah*, the second century codification of oral Jewish law. It is "the first canon of its kind known to us, a canon that transmits the tradition in the form of controversy." HALBERTAL, *supra* note 18, at 45. It therefore stands in contrast to normal canonical texts that "select and censor in order to create an authoritative body out of contending candidates." *Id.* at 45. Halbertal masterfully traces the effect that the process of recording dissenting opinions can produce within the Jewish legal system. *See id.* at 50-72. Evidently, the Rif was so imbued in the dialectical process of talmudic reasoning spawned by the *Mishnah* that quoting a rival point of view just came naturally to him.

²⁵⁰ Why bother with a dissent? Embroidering on the point raised in the preceding footnote, a legal system that respects losing viewpoints enough to record them gains added vitality—a seed from the failed point of view remains dormant, perhaps to sprout another day or in another place.

²⁵¹ At this point, the dissenters cite to a portion of the Supreme Court's *Sony* opinion regarding the constitutionality of limited term for copyright protection. Perhaps quoting the following comment from the same opinion would have been even more salient: "[Copyright] protection has never accorded the copyright owner complete

The anti-circumvention language of H.R. 2281, even as amended, bootstraps the limited monopoly into a perpetual right. It also fundamentally alters the balance that has been carefully struck in 200 years of copyright case law, by making the private incentive of content owners the paramount consideration—at the expense of research, scholarship, education, literary or political commentary, indeed, the future viability of information in the public domain. In so doing, this legislation goes well beyond the rights contemplated for copyright owners in the Constitution.

The . . . amendment, representing a compromise between those on the content side and “fair use” proponents, simply delays this constitutional problem for a period of two years.^[252] Delegating authority to develop anti-circumvention regulations to the Secretary of Commerce^[253] was a means to eliminate the stalemate that existed, but it is not, by itself a comment on the need for limitations on this [sic] anti-circumvention rights. . . .

What we set out to do was to restore some balance in the discussion and to place private incentive in its proper context. We had proposed to do this by legislating an equivalent fair use defense for the new right to control access. For reasons not clear to us, and despite the WIPO Treaty language “recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information . . . ,” our proposal was met with strenuous objection. It continued to be criticized even after it had been redrafted, and extensively tailored, in response to the myriad of piracy concerns that were raised.²⁵⁴

These sharp criticisms serve as useful tools to evaluate the law that ultimately emerged.²⁵⁵ After reviewing the contours of the final law,²⁵⁶

control over all possible uses of his work.” *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984). In the accompanying footnote, the Court cites numerous instances in which it has rebuffed efforts over the decades that proprietors have made to extend copyright “in absolute terms to the exclusion of all else.” *Id.* at 432 n.13.

²⁵² See *infra* Part III.C.4.b (describing in detail the purpose and likely impact of the “two-year delay”).

²⁵³ As ultimately enacted, regulations are to be promulgated by the Register of Copyrights, rather than the Secretary of Commerce. See *supra* note 120 (discussing the Register of Copyrights’s role as rulemaker).

²⁵⁴ COMMERCE REP. (DMCA), *supra* note 46, at 85-86 (additional views of Reps. Klug and Boucher).

²⁵⁵ The “dissenters” ended their commentary with these words:

In the end, this legislation purports to protect creators. It may well be that additional protections are necessary, though we think the 1976 Copyright Act is sufficiently flexible to deal with changing technology. Whatever protections Congress grants should not be wielded as a club to thwart consumer demand for innovative products, consumer demand for access to information, consumer demand for tools to exercise their lawful rights, and consumer expecta-

the discussion below therefore returns to the points just raised, as well as to these critics' statements on the House floor.²⁵⁷

3. Adoption into Law

a. *Explicit Effect on Fair Use*

Despite its internal critics, the Commerce Committee's approach prevailed in the full House of Representatives over the Judiciary Committee's bill and was ultimately enacted by both chambers.²⁵⁸ The ultimate bill did not simply contain a basic provision in section 1201 protecting solely the technical processes used by those controlling content;²⁵⁹ instead, Congress adopted that feature²⁶⁰ in tandem with corollary features delaying its impact²⁶¹ and providing an exception for adversely affected users.²⁶²

However, the WIPO Treaties Act does not itself amend the fair use doctrine²⁶³ as applied to copyright infringement.²⁶⁴ The legislative his-

tions that the people and expertise will exist to service these products. COMMERCE REP. (DMCA), *supra* note 46, at 86-87 (additional views of Reps. Klug and Boucher).

²⁵⁶ See *infra* Part III.C.3.a (discussing the final law's explicit effect on fair use).

²⁵⁷ See *infra* Part III.C.3.b (considering further the arguments of those opposed to the final law).

²⁵⁸ Notwithstanding that Congress rejected the Commerce Committee's proposal to take the entire anti-circumvention scheme outside the Copyright Act, the final legislation largely adopts the Commerce Committee's approach. See *supra* note 103.

²⁵⁹ It would be inaccurate to refer to those in control of content as "copyright owners" (although the terms may overlap in large part) for the former category also includes those who have secured the technological means to control access to works that lie outside copyright protection. A low-tech example of that phenomenon would be one who unearths the sole surviving manuscript of a lost Shakespeare play. See 1 NIMMER, *supra* note 4, § 2.01[A] (hypothesizing such a manuscript in a British museum). Of course, as the cookbook example illustrates, it is almost trivially easy to transform a public domain work into part of a larger whole that is itself subject to copyright protection. See *supra* text accompanying notes 220-21 (suggesting addition of copyrightable introduction to public domain cookbooks).

²⁶⁰ See *supra* Part II.B (detailing the three anti-circumvention provisions in § 1201).

²⁶¹ See *supra* Part II.C.2.c (explaining why the circumvention ban does not take effect until October 28, 2000).

²⁶² See *supra* Part II.C.2.b (describing the inapplicability of the anti-circumvention ban to users whose copyrighted work falls "in a particular class of works").

²⁶³ In addition, § 1201 contains a provision specifically disclaiming any spillover onto a traditional fair use defense. 17 U.S.C. § 1201(c)(1) (Supp. IV 1998). But that feature is merely negative. The provisions discussed above as to delayed effectiveness and exceptions for adversely affected users, by contrast, affirmatively import into the WIPO Treaties Act some solicitude for the fair use interest of those who access works of authorship. As to how far that solicitude extends, see *infra* Part III.C.4 (considering the practical impact of the WIPO Treaties Act).

tory explains that Congress “determined that no change to section 107 was required because section 107, as written, is technologically neutral, and therefore, the fair use doctrine is fully applicable in the digital world as in the analog world.”²⁶⁵ Instead, vindication of user interest comes directly in section 1201 itself and in other aspects of the Digital Millennium Copyright Act.²⁶⁶ In other words, there is no such thing as a section 107 fair use defense to a charge of a section 1201 violation; rather, section 1201 itself includes provisions designed to aid the interests of users.

b. *Dissenters’ Reconciliation*

When the matter later came to its first vote in the full House of Representatives, Representative Klug—one of the dissenters quoted above—spoke of the “very difficult balancing act” that led to a “reasonable compromise” in the bill’s contours.²⁶⁷ He praised the Commerce Committee for having corrected an “automatic transition to a pay-per-view world by creating an exception for persons having gained lawful access who are or are likely to be adversely affected by the prohibition.”²⁶⁸ Later, when the House-Senate conferees had worked out their differences, he rose in strong support of the bill,²⁶⁹ specifically citing “two changes to the bill to instill the balance envisioned by our constitutional architects and in the long tradition of the Commerce

²⁶⁴ Note that § 1201 deals with something that can be denominated “paracopy-right,” rather than with copyright infringement proper. See *supra* note 66.

²⁶⁵ S. REP. (DMCA), *supra* note 36, at 23-24.

²⁶⁶ See *supra* Part III.A (discussing the attempt to balance the interests of copyright owners with those of users).

²⁶⁷ 144 CONG. REC. H7100 (daily ed. Aug. 4, 1998) (statement of Rep. Klug).

²⁶⁸ *Id.* That characterization is inaccurate. The parties that are adversely affected need not have obtained lawful access. See *supra* Part II.C.2.b. Conversely, parties who have obtained lawful access can make any fair use of the subject work, even if not adversely affected by the prohibition. See *supra* Part III.C.2.

In his next sentence, Representative Klug stated, “In interpreting ‘lawful access,’ it is my hope that this term is broadly construed to include students at a university, patrons in a library, and investigative journalists who obtain critical information, among others.” 144 CONG. REC. H7100. If the WIPO Treaties Act actually did allow students and journalists to disable technological protections to gain access to works, then its breathing space for fair use would be far more expansive than that of the actual § 1201 as enacted, as the discussion below demonstrates. See *infra* Part III.C.4.a (considering hypothetical cases of uses of copyrightable material and the application of § 1201 in these situations).

²⁶⁹ 144 CONG. REC. H10621 (daily ed. Oct. 12, 1998) (statement of Rep. Klug) (lauding the bill’s “thoughtful, balanced manner that promotes product development and information usage” and urging his “colleagues to vote for this legislation”).

Committee."²⁷⁰ The first is its incorporation of "the strong fair use provision the Commerce Committee crafted, for the benefit of libraries, universities, and consumers generally."²⁷¹ The second is the "no mandate" provision,²⁷² a portion of the law which "clarifies that nothing in section 1201 creates a mandate requiring manufacturers of consumer electronics, telecommunications, and computing products to design their products or their parts and components to respond to any particular technological measure employed to protect a copyrighted work."²⁷³ It bears mentioning that those cited features all formed part of the bill as initially reported out by the Commerce Committee²⁷⁴ at a time when Representative Klug was in the role of dissenter.²⁷⁵

Representative Boucher, the other initial dissenter, likewise rose to support passage of the bill,²⁷⁶ which he characterized as a "balanced result" ensuring "that traditional user rights are not undermined."²⁷⁷ An ally offered more explanation in his remarks. Representative Stearns elaborated that he and Representative Boucher agreed to withdraw their earlier amendment in order to push the bill forward, in exchange for language in the Commerce Committee report that "expanded on the proper definition of a 'technological protection

²⁷⁰ *Id.*

²⁷¹ *Id.* The reference to libraries and universities is presumably to the exemption enjoyed by those entities. See H. REP. (DMCA), *supra* note 63, at 4 (containing section entitled "Exemption for Nonprofit Libraries, Archives, and Educational Institutions"). See *supra* notes 140-41 and accompanying text (outlining the exemption granted to nonprofit libraries).

²⁷² 144 CONG. REC. H10621 (daily ed. Oct. 12, 1998) (remarks of Rep. Klug).

²⁷³ S. REP. (DMCA), *supra* note 36, at 30. See 3 NIMMER, *supra* note 4, § 12A.05[C] (discussing the "no mandate" provision). Note, however, that a separate portion of the law emphatically abandons the "no mandate" approach with respect to consumer analog videotape recorders. See *id.* at § 12A.06 (noting copy control technological requirements for certain analog videocassette recorders).

²⁷⁴ See COMMERCE REP. (DMCA), *supra* note 46, at 3-4 (containing the fair use and no mandate provisions).

²⁷⁵ See *supra* Part III.C.2.c (detailing objections to the Commerce Committee's report on H.R. 2281). Moreover, those two features appear far afield from the concerns over user rights with which the discussion above grapples.

²⁷⁶ See 144 CONG. REC. H7096 (daily ed. Aug. 4, 1998) (remarks of Rep. Boucher).

²⁷⁷ *Id.* Commenting on the Conference Report, Representative Boucher stated that "the legislation is not intended to diminish core fair use and other rights that have always been recognized in our copyright law." 144 CONG. REC. E2166 (daily ed. Oct. 14, 1998) (remarks of Rep. Boucher). A long letter from Howard Coble, the Chairman of the House Judiciary Subcommittee, defining some of the terminology used in the statute, is appended to Representative Boucher's statement. See 144 CONG. REC. H7096-H7098 (daily ed. Aug. 4, 1998) (remarks of Rep. Boucher).

measure.”²⁷⁸ How that definition safeguards user rights remains unspecified.²⁷⁹

* *

By the time the WIPO Treaties Act was enacted, solicitude for fair use in the digital environment exceeded support for mother's apple pie,²⁸⁰ and “the specter of moving our Nation towards a ‘pay-per-use’ society”²⁸¹ had become as popular in Congress as the Mafia drug trade.²⁸² Not a single speaker in either the House or the Senate rose to express any other point of view.²⁸³ Instead, the Rema's compromise

²⁷⁸ 144 CONG. REC. H7101 (daily ed. Aug. 4, 1998) (remarks of Rep. Stearns).

²⁷⁹ Representative Stearns later stressed that “those measures covered by the bill are those based upon encryption, scrambling, authentication and some other measure which requires the use of, quote, a key provided by a copyright holder.” 144 CONG. REC. H10618 (daily ed. Oct. 12, 1998) (remarks of Rep. Stearns). *See* COMMERCE REP. (DMCA), *supra* note 46, at 39 (“[M]easures that can be deemed to ‘effectively control access to a work’ would be those based on encryption, scrambling, authentication, or some other measure which requires the use of a ‘key’ provided by a copyright owner to gain access to a work.”)

²⁸⁰ *See, e.g.*, 144 CONG. REC. E1640 (daily ed. Aug. 4, 1998) (remarks of Rep. Tauzin) (“A free market place for ideas is critical to America. It means that any man, woman or child—free of charge!!—can wander into any public library and use the materials in those libraries for free.”); 144 CONG. REC. H7102 (daily ed. Aug. 4, 1998) (remarks of Rep. Hastert) (emphasizing that digitized products “should not hinder a child's learning . . . or complicate an academic's research . . . or prevent a high-tech engineer in Illinois from improving innovative products”); 144 CONG. REC. H7093 (daily ed. Aug. 4, 1998) (remarks of Rep. Bliley) (stressing that a strong fair use provision was included “to ensure that consumers as well as libraries and institutions of higher learning will be able to continue to exercise their historical fair use rights”).

²⁸¹ 144 CONG. REC. S11887 (daily ed. Oct. 8, 1998) (remarks of Sen. Ashcroft).

²⁸² As Representative Dingell has noted:

As copyrighted works are afforded more protection, they will be encrypted in “digital wrappers” that make them impenetrable to anyone other than those who are willing to pay the going rate. While that may sound like the American way, it is not. United States copyright law historically has carved out important exceptions to the rights of copyright owners.

144 CONG. REC. H7099 (daily ed. Aug. 4, 1998) (remarks of Rep. Dingell); *see also, e.g.*, 144 CONG. REC. H7101 (daily ed. Aug. 4, 1998) (remarks of Rep. Stearns) (noting the inclusion of language to “protect consumers from a ‘pay-per-view’ world in the digital area”); 144 CONG. REC. E2144 (daily ed. Oct. 13, 1998) (remarks of Rep. Tauzin) (describing pay-per-view as “profoundly antithetical to our long tradition of the exchange of free ideas and information”).

²⁸³ Even during deliberations on the bill, the hearings contain universal support for maintaining a robust fair use defense, even from witnesses on the “content side” as opposed to the “user side.” For instance, in response to one of Representative Lofgren's frequent questions about how fair use would be safeguarded on the Internet,

reigned supreme,²⁸⁴ and the lawmaking body crafted rules to intervene and remedy the lack of availability of a given class of works, such as the physics textbooks and baroque concerti invoked earlier.²⁸⁵

Whether as a matter of conviction or acknowledgment of political reality, at the end of the day no one remained opposed to the entire Digital Millennium Copyright Act,²⁸⁶ including the provision just mentioned safeguarding user access to restricted works.²⁸⁷ Analysis of the legal impact of this provision, however, must proceed from reason rather than an appeal to authority on either side of the divide.²⁸⁸

4. Analysis

With the adoption of the Commerce Committee's approach, both praised as balanced and derided as inadequate, a question arises as to how well section 1201 safeguards fair use and whether it successfully avoids the universally decried risk of a pay-per-use world. Based on the above analysis of section 1201, we can now gauge the practical impact of the WIPO Treaties Act.

one witness supporting the Act testified that "my association is totally committed to and in favor of the doctrine of fair use." 1997 *Hearings, Serial No. 33*, *supra* note 90, at 235 (statement of Michael Kirk, Executive Director, American Intellectual Property Law Association). See *id.* at 47 ("The challenge is how to [provide] . . . protection to copyright owners, while avoiding chilling . . . lawful uses of copyrighted works and public domain materials.") (statement of Register of Copyrights Peters); *id.* at 229 (suggesting that legislation should be amended to add to § 1201(a) "without the authority of the copyright owner or in a manner that constituted fair use") (statement of Rep. Frank) (emphasis added).

²⁸⁴ See *supra* Part I (describing the Rema's authorization for a lawmaking body to intervene to provide unavailable works).

²⁸⁵ See *supra* Part II.C.2.b (positing restricted access to those categories).

²⁸⁶ See Thomas P. Olson, *The Iron Law of Consensus: Congressional Responses to Proposed Copyright Reforms Since the 1909 Act*, 36 J. COPYRIGHT. SOC'Y 109, 111 (1989) (stating that "[c]hanges in the Copyright Act have almost always been enacted with the consent of all 'respectable' interest groups that would be affected by the change"). In sharp contrast, the previous day Congress passed a separate amendment to the Copyright Act over bitter opposition. Various legislators rose to call the Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827, Sec. 201 (Oct. 27, 1998), an "outrageous" and "bitter pill to swallow," 144 CONG. REC. S12434 (daily ed. Oct. 12, 1998) (remarks of Sen. Thompson), a "shortsighted policy" and "an unconstitutional taking," 144 CONG. REC. E2089 (daily ed. Oct. 11, 1998) (remarks of Rep. Scarborough), as well as "hypocritical," 144 CONG. REC. E2070 (daily ed. Oct. 11, 1998) (remarks of Rep. Gordon).

²⁸⁷ See *supra* Part II.C.2 (discussing the user exemption of § 1201).

²⁸⁸ Just because the dissenters initially criticized the majority approach does not by itself render their criticism valid. Conversely, just because they may have ultimately altered their stance does not itself undermine the validity of their previous criticism.

a. Case Studies

Let us revert to the public domain cookbook or sound recording²⁸⁹ that has been combined with a new introduction or other material subject to copyright and brought under a technological protection measure.²⁹⁰ As of the year 2005, those works could be virtually unavailable through low-tech means yet accessible to those who have paid for the appropriate decryption algorithm or password. In such a world, let us further imagine that Alice hacks her way in, gaining access to the work to avoid paying the license fee associated with taking out an authorized password. Bob does the same but instead to determine if he likes the old jazz song enough to pay the freight for regular access to it. Carol is writing her Ph.D. dissertation on obscure diction and wants to quote archaisms and *franglais* from the mouths of Creole chefs, which she remembers (from browsing a copy of the book long ago at a second-hand shop) are contained in the cookbook. Finally, Ted is a software virtuoso who boasts that he “can pick any lock.”²⁹¹ How does their conduct stack up?

Alice is the quintessential violator²⁹²—hers is the precise conduct against which the basic provision is aimed.²⁹³ Accordingly, there is no question that her circumvention of a technological measure that effectively controls access to a work protected by a subsisting U.S. copyright places her in violation of the statute.²⁹⁴ Can she nevertheless take refuge in the fact that the publisher is actually charging for a work in the public domain rather than one protected by copyright? Inasmuch as the publisher has implemented a password scheme that prevents unauthorized access to its works, which themselves are sub-

²⁸⁹ See *supra* Part III.C.1 (using examples of cookbooks and old music recordings to illustrate conversion of public domain works into copyrightable derivative works, and hence potentially royalty-generating items).

²⁹⁰ See *supra* Part II.B (describing the technological protection measures).

²⁹¹ See ANNE WELLS BRANSCOMB, WHO OWNS INFORMATION? 90 (1994) (“[F]or every technological lock placed within the work product, there will be a pirate locksmith ready and willing to break in . . . merely for the joy of accomplishment.”).

²⁹² Note that the terminology here is not “infringer,” inasmuch as § 1201 does not safeguard copyright so much as something that can be termed “paracopyright.” See COMMERCE REP. (DMCA), *supra* note 46, at 24 (stating that the provisions are concerned with “paracopyright”); *supra* note 66 (same).

²⁹³ See *supra* Part II.B (laying out the basic provision and other anti-circumvention features).

²⁹⁴ See 17 U.S.C. § 1201(a)(1)(A) (Supp. IV 1998) (“No person shall circumvent a technological measure that effectively controls access to a work protected under this title.”).

ject to copyright by virtue of the new additions,²⁹⁵ that argument is unavailing. Although Alice would not run afoul of section 1201 by hacking her way into a domain containing no copyrightable elements, the domain to which she in fact gained unauthorized entry does contain copyrighted elements—withstanding that the particular components that she ultimately wished to enjoy lie outside copyright protection. Given that the language of the statute is absolute²⁹⁶—“[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title”²⁹⁷—Alice is culpable for the anti-circumvention violation.

What about Bob? Many publishers release shareware, which customers can “try on for size” during a test period.²⁹⁸ Shareware publishers do not fall within the framework of the anti-circumvention basic provision and its coordinate trafficking offense; instead, they fall under the “additional violations.”²⁹⁹ In that context, there is no counterpart basic offense to dovetail with the additional violations, so Bob’s conduct would be nonactionable against a shareware publisher.³⁰⁰ In effect, Bob has elected to treat the subject music as shareware; an honorable listener, he has an unblemished track record of paying for all recordings that he actually adds to his collection.

Ultimately, however, Bob too falls on the wrong side of the tracks laid by section 1201. Although publishers are free to adopt the shareware paradigm, they are not obligated to do so. Bob cannot unilaterally pigeonhole purveyors of works into a category from which they have absented themselves—to make proprietary publishers into shareware publishers. Bob has no right to browse the access-protected works to determine if he wants to buy them. Section 1201 grants such

²⁹⁵ See *supra* notes 219-22 and accompanying text (describing how the addition of a small amount of original material to works that have fallen into the public domain allows the publisher to claim a copyright in the whole work).

²⁹⁶ See *supra* Part III.C.3 for a discussion of how Congress adopted essentially the same language from the House Judiciary Committee bill that the House Commerce Committee found so unbalanced.

²⁹⁷ 17 U.S.C. § 1201(a)(1)(A).

²⁹⁸ On “shareware,” see 2 NIMMER, *supra* note 4, § 7.25 n.11 (“Unfortunately, the term is undefined in the current act and is susceptible of different meanings in the computer and legal communities.” (internal citation and quotation omitted)). On potential strategies in the future for the distribution of software via subscriptions, see I. TROTTER HARDY, PROJECT LOOKING FORWARD: SKETCHING THE FUTURE OF COPYRIGHT IN A NETWORKED WORLD—FINAL REPORT 108-12 (1998).

²⁹⁹ See *supra* Part II.B (distinguishing the three separate types of anti-circumvention violations contained in § 1201).

³⁰⁰ See *supra* Part II.B.3 (stating that a person who has lawful access to a work does not violate any provision of § 1201 by engaging in prohibited usage of the work).

browsing rights only to qualifying libraries and archives, not to individuals such as Bob.³⁰¹

Bob, like Alice, cannot take refuge in the fact that the recordings themselves reside in the public domain, for the language of the statute is such that Bob runs afoul of it.³⁰² Given that the subject recordings are contained in a file that contains the copyrighted commentary of a renowned musicologist, that the file as a whole is protected by a technological measure that effectively controls access to it, and that Bob hacked his way into that file, all the elements for a section 1201 violation are present—again, notwithstanding that the particular components that Bob ultimately wished to enjoy lie outside copyright protection.

The examples of Alice and Bob seem to bear out the dissenters' initial criticism³⁰³ that "[t]he anti-circumvention language of H.R. 2281, even as amended, bootstraps the limited monopoly into a perpetual right."³⁰⁴ To be sure, that bootstrapping is far from inevitable—it comes to bear only in a world in which the sole effective means of access to the subject cookbook and recording is through the encrypted methodology posited above. Hopefully, that state of affairs would never come to pass—just as one entity was able to obtain a copy of the subject works in order to upload them, so others should be able to do the same. The latter, moreover, can offer those works free of charge.³⁰⁵ Therefore, it might be that the first publisher's efforts at

³⁰¹ See 17 U.S.C. § 1201(d)(5) (granting an exemption from § 1201 to libraries and archives whose collections are either open to the public, or available to not only affiliated researchers, but also to "other persons doing research in a specialized field"); see 3 NIMMER, *supra* note 4, § 12A.04[A][2] ("In order for an institution to qualify for this exemption, it must be a 'nonprofit library, archives or educational institution.'" (quoting 17 U.S.C. § 1201(d)(1))).

³⁰² For Bob to interpose such a defense, the statute would have to read, contrary to fact, "[n]o person shall circumvent a technological measure that effectively controls access to a work protected by this title *except for the purpose of accessing uncopyrighted material*." See also 1997 Hearings, Serial No. 33, *supra* note 90, at 229 (containing alternative language that Rep. Frank mused Congress could have drafted).

³⁰³ See *supra* Part III.C.2.c (stating that the statute would give copyright owners the ability "to 'lock up' their works in perpetuity").

³⁰⁴ COMMERCE REP. (DMCA), *supra* note 46, at 85 (Additional Views of Representatives Klug and Boucher). In *United States v. American Soc'y of Composers, Authors, and Publishers*, 902 F. Supp. 411, 422 (S.D.N.Y. 1995), a party challenged ASCAP's definition of "program subject to fee" that included material that was not subject to copyright protection. The court invalidated that construction under ASCAP's consent decree. Parallel logic would conclude that material subject to regulation under the Digital Millennium Copyright Act does not include material for which no license is required because it is no longer subject to copyright protection.

³⁰⁵ Neither party had to undertake the cost of creating the underlying works, so

constructing its own *domaine public payant*³⁰⁶ will be doomed to failure. The point, however, is that the structure of section 1201, despite protestations to the contrary,³⁰⁷ does not categorically negate this baleful possibility—unless through the exception for adversely affected users,³⁰⁸ to which the discussion turns below.

Before reaching those points, however, consider Carol and Ted. Not only is Carol (the Ph.D. candidate) using a public domain work—a circumstance that, as observed in the cases of Alice and Bob, affords only cold comfort—but even such isolated quotation as she is drawing from the work, were it copyrighted, would itself find shelter under the fair use umbrella.³⁰⁹ Does section 1201 catch even her in its net? It does. For regardless of how lofty her purpose might be, she has violated the elements of the statute. Although, as noted in the discussion of Bob, section 1201 contains no prohibition on disabling technological measures once access to a work has been lawfully gained, as the Commerce Committee dissenters specifically com-

there is little reason why a second comer cannot simply ignore the “value-added” introduction of the first party (which caused copyright protection to attach in the first instance) and offer the public domain work at a lower price—or for nothing.

³⁰⁶ See Janusz Barta & Ryszard Markiewicz, *Poland*, in 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 3[2][c] (Paul Edward Geller & Melville B. Nimmer eds., perm. ed. rev. vol. 1999) (“[P]roducers of copies of literary and musical works, works of the fine arts, [and] photographic and cartographic works . . . published in Polish territory and . . . the public domain . . . must transmit to the Fund for the Promotion of Creativity [a] percent of their gross receipts arising from . . . these works . . .”); Miguel A. Emery, *Argentina*, in 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra*, § 4[3][d] (“[P]arties engaging in the publication, reproduction, or diffusion in Argentina of works fallen into the public domain [must] pay a contribution to the National Fund of the Arts.”); Mihály Ficsor, *Hungary*, in 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra*, § 4[3][f] (“‘After the expiration of the protection of the author’s economic rights, a charge shall be paid in cases specified by statutory provisions.’ . . . Resulting payments are collected by an organization appointed by the Minister of Justice . . .”).

³⁰⁷ See *supra* Part II.C.2 (referring to the “fail-safe” mechanism).

³⁰⁸ See *supra* Part II.C.2 (describing the circumstances in which Congress will allow the anti-circumvention provisions to be selectively waived so as to prevent the unjustifiable diminution of access to copyrighted materials for lawful purposes). Note that the statute also contains a safeguard for users by delaying the effective date of the basic provision for two years. See COMMERCE REP. (DMCA), *supra* note 46, at 37 (stating that the primary reason for the delay is to develop a record as to how the implementation of new technologies affects the availability of works for lawful uses). Inasmuch as Alice’s and Bob’s conduct is posited to occur as of the year 2005, however, that grace period has long since passed.

³⁰⁹ The fair use provision singles out for special consideration “purposes such as . . . teaching [and] scholarship.” 17 U.S.C. § 107 (1994). See also *Sundeman v. Sea-Jay Soc’y, Inc.*, 142 F.3d 194, 202-03 (4th Cir. 1998) (holding a scholarly appraisal “from a biographical and literary perspective” to be fair use).

plained, their effort at "legislating an equivalent fair use defense for the new right to control access" was rejected "for reasons not clear to us."³¹⁰

But why does the fair use doctrine itself not come to Carol's rescue? Even though Congress did not add to section 1201 a specific fair use proviso that covers Carol, it at least left the existing provision undisturbed.³¹¹ Given that Carol's activities fall quintessentially within the protection of that defense, why is it inadequate to doom any cause of action against her? The answer lies in how the Copyright Act is structured. On the one hand, the Act forbids copyright infringement³¹² subject to a fair use defense.³¹³ On the other hand, the WIPO Treaties Act adds a wholly separate tort of unauthorized circumvention,³¹⁴ to which the fair use defense is inapplicable.³¹⁵

The upshot is that Carol, too, having circumvented a technological measure that effectively controls access to a work protected by U.S. copyright,³¹⁶ falls afoul of section 1201. From a traditional copyright

³¹⁰ COMMERCE REP. (DMCA), *supra* note 46, at 86 (Additional Views of Representatives Klug and Boucher).

³¹¹ See *supra* Part III.C.3.a (discussing the effect of § 1201 on fair use).

³¹² See 17 U.S.C. §§ 106, 501 (1994 & Supp. IV 1998) (granting the copyright owner the exclusive right to reproduce, prepare derivative works based upon, distribute copies of, perform, or display the copyrighted work, and authorizing the owner to institute an action for an infringement of these rights).

³¹³ 17 U.S.C. § 107 ("[T]he fair use of copyrighted work . . . is not an infringement of copyright.").

³¹⁴ For that reason, the legislative history refers to it as "paracopyright." See *supra* note 66.

³¹⁵ See *supra* Part III.C.3.a ("There is no such thing as a section 107 fair use defense to a charge of a section 1201 violation."). Given that the hearings for the Digital Millennium Copyright Act contain endless complaints about this state of affairs, it scarcely can have arisen by oversight. Consider the following representative extract:

By focusing on the technological act of circumvention in and of itself, as opposed to copyright infringement, the Administration bill creates a number of problems, among them the significant diminution of fair use. It is entirely possible that circumvention of a protection measure would enable fair use of the work. However, fair use is only relevant as a limitation on liability for infringement. If the new legislation does not use copyright infringement as the criterion for violation of the copyright act, then fair use is not a limitation on liability.

1997 Hearings, Serial No. 33, *supra* note 90, at 260 (statement of Edward J. Black, President, Computer and Communications Industry Association).

³¹⁶ As previously noted in the context of both Alice and Bob, it is no help to Carol's defense that she was only seeking to obtain ultimate access to works in the public domain. In order to arrive at her goal, she disabled protection that excluded the public from access to the introduction to the 1875 cookbook, which was written in 1999 and therefore subject to copyright protection.

standpoint, the purportedly "fair" character of her utilization affords no defense to a charge that she is culpable of a new anti-circumvention violation.

At last reaching Ted (the hacker), to the extent that he advertises his abilities to or performs services for Alice, Bob, or Carol, he would thereby be aiding individuals who themselves fall afoul of section 1201. As such, he would be culpable of a trafficking violation.³¹⁷

* *

As noted above, the House Commerce Committee, in order to balance user interests against owner interests, added two features to section 1201 that were lacking from the Judiciary Committee bill.³¹⁸ One of these features delays the application of the basic provision for two years.³¹⁹ The other creates exceptions for the benefit of adversely affected users.³²⁰ If relief is to be found from the perpetual "lock up" of public domain works, its locus must lie in these two additions.

b. *Two-Year Delay*

As to the time limit, it offers no aid past 2000. As the dissenters commented, it "simply delays this constitutional problem for a period of two years."³²¹ Given the hypothetical posture above, in which Alice, Bob, and Carol were acting in 2005, this feature offers no safeguard to their interests.

Nonetheless, it is still instructive to inquire how far the grace period goes in protecting user interests. Let us imagine that David wants access in 1999 to the same ancient recording posited above, and, further, that it is packaged with a musicologist's recent commentary. Because the basic provision is inapplicable during this time period, he can hack into the system to his heart's content without violating sec-

³¹⁷ See 17 U.S.C. § 1201(a)(2) (Supp. IV 1998) (setting out the provisions of the trafficking ban). See *supra* notes 68-76 and accompanying text (describing the trafficking ban).

³¹⁸ See *supra* notes 245-46 and accompanying text (discussing fair use principles in the creation of this balance).

³¹⁹ See *supra* note 133 and accompanying text (detailing the basic provision's effective date).

³²⁰ See *supra* notes 107-09 and accompanying text (clarifying the class of persons to which the bar does not apply).

³²¹ COMMERCE REP. (DMCA), *supra* note 46, at 85-86 (Additional Views of Representatives Klug and Boucher). For additional context, see *supra* notes 250-54 and accompanying text, which excerpt the dissenters' comments.

tion 1201.³²²

Positing further, however, that the gregarious David knows the music he likes but lacks the technical wherewithal to access it, he must hire the withdrawn but brilliant Lisa to disable the encryption in which the music is currently wrapped. Imagine further that Lisa manufactures a device called JazzExtract that can indeed pluck out of its secure envelope the music that David wants; without the machine, however, the music lies beyond David's grasp.

Selling a device falls within the statute's trafficking ban rather than the basic provision.³²³ That trafficking ban is not subject to a two-year delay; rather, it takes effect immediately.³²⁴ As a consequence, David cannot buy in 1999 the device that allows him to exercise the rights he possesses in 1999.³²⁵

Does this statutory scheme make sense? As previously noted, the reason for the two-year delay in the basic provision "is to allow the development of a sufficient record as to how the implementation of these technologies is affecting availability of works in the marketplace for lawful uses."³²⁶ Even before the game begins, however, users such as David, who lack technical expertise, are effectively checkmated.

As a result, section 1201 produces a most curious state of affairs. It safeguards various rights to users but simultaneously bars third parties from assisting them to take advantage of those safeguarded rights.³²⁷ Although the WIPO Treaties Act forms an outgrowth of the

³²² See *supra* notes 133-34 and accompanying text (establishing the date the ban takes effect).

³²³ See *supra* note 67 and accompanying text (noting that the targets of the trafficking ban are those who facilitate the hacking process).

³²⁴ See *supra* note 133 (noting the lack of any language delaying the provision's effective date).

³²⁵ Larry Lessig's insights help unravel some of the multiple levels at issue here. The code that regulates Lisa, stopping her from helping David, is Title 17 of the United States Code, in which § 1201 is codified. By contrast, the code that regulates David—who is under no comparable legal disability—forestalling him from obtaining the music he wants, is the computer encoding that encrypts that music or otherwise places it beyond his grasp. See generally LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999).

³²⁶ COMMERCE REP. (DMCA), *supra* note 46, at 37. See *supra* notes 134-35 and accompanying text (discussing the purpose of the delay).

³²⁷ What if, in place of David, Goliath Inc. occupies this position? Presumably, if employee P needs access to a given work, and if employee Q is assigned to circumvent technological measures in order to help P, then both of their activities are imputed to their principal, and there is no liability in this instance. See COMMERCE REP. (DMCA), *supra* note 46, at 43 (evinced sensitivities to "small software developers who do not have the capability of performing these functions in-house," thus implying that big

law governing related defendants,³²⁸ that amendment stands on its head³²⁹ the proposition that related defendants cannot be liable for the offenses of others unless those others have actually committed an offense.³³⁰

c. *Statutory Exception for Users*

The two-year delay thus cannot serve as the basis for justifying the Commerce Committee's claim that it has achieved balance, as applied to such cases as those of Alice, Bob, and Carol. More promising, though, is the exemption for adversely affected users of particular copyrighted works. Although the basis for this exception has already been discussed,³³¹ it is worth reiterating the House Commerce Committee's own rationale:

[T]he Committee is concerned that marketplace realities may someday dictate a different outcome, resulting in less access, rather than more, to copyrighted materials that are important to education, scholarship, and other socially vital endeavors. This result could flow from a confluence of factors, including the elimination of print or other hard-copy versions, the permanent encryption of all electronic copies, and the adoption of business models that depend upon restricting distribution and availability, rather than upon maximizing it. In this scenario, it could be appropriate to modify the flat prohibition against the circumvention of effec-

software developers would be able to rely on their employees to perform the subject tasks).

³²⁸ See 3 NIMMER, *supra* note 4, § 12A.01[A] (delineating liability for "related defendants").

³²⁹ Do any facets of pre-existing law resemble this outcome? One case forbade the making of off-the-air videotapes for commercial purposes on behalf of clients who themselves would be privileged to do so acting in a private capacity. See *Pacific & S. Co. v. Duncan*, 744 F.2d 1490, 1496 (11th Cir. 1984) ("[A] commercial purpose makes copying onto a videotape cassette presumptively unfair." (quotations omitted)). But the reason for the discrepancy in *Duncan* is that the client's taping is saved from liability only because it is noncommercial, whereas the commercial taping is undertaken for pecuniary gain, and is liable on that basis. Here, by contrast, David's activity is noninfringing even if undertaken for commercial purposes because it falls into a statutory safe harbor. Yet Lisa cannot even give him gratis a device to help him attain his legitimate goal.

³³⁰ See 3 NIMMER, *supra* note 4, § 12.04[A][3][a] (explaining that a direct infringement must exist for there to be third-party liability). Note, however, that some disagree with this proposition. See HARDY, *supra* note 298, at 181 n.200 (collecting authorities questioning the position that a direct violation is required for a contributory violation).

³³¹ See *supra* notes 98-103 and accompanying text (considering the importance of continued marketplace access to scholarly and socially vital materials that motivated Congress to include the exemption).

tive technological measures that control access to copyrighted materials, in order to ensure that access for lawful purposes is not unjustifiably diminished.³³²

As previously noted, the dissenters maintained that this feature did not go far enough in safeguarding user interests.³³³

Let us now add Harry and Sally to our cast of characters. Harry capitalizes on the statute's adverse effect on individuals such as Bob and Carol. He demonstrates to the satisfaction of the Register of Copyrights that nineteenth-century cookbooks and vintage 1920s jazz recordings have been locked up with new copyrightable additions in digitally wrapped envelopes and are effectively unavailable for browsing and fair use quotation. As a consequence of Harry's proof, regulations emerge exempting those two categories of particular works from the anti-circumvention ban. Harry is now free to hack into those works; the content owners whose technological measures are thereby circumvented remain powerless to object.

To this extent, the statute contains the safeguards for fair use that the Commerce Committee desired. As enacted, the WIPO Treaties Act therefore mollifies some of the concerns over fair use at which the committee aimed.³³⁴

Now imagine that Harry is himself a chef or musician who (like David confronted above) lacks the expertise to personally effectuate the access to which he is legally entitled. Sally is a whiz who can help him. Unlike Ted, who was hired to aid people to accomplish what section 1201 forbids, Sally is to be hired to aid someone who has every right under section 1201 to circumvent the technological protections in order to obtain access. It would seem, therefore, that her conduct should not only be exempt under the statute, but that it should be

³³² COMMERCE REP. (DMCA), *supra* note 46, at 36.

³³³ See *supra* notes 251-54 and accompanying text (quoting Representatives Klug and Boucher's critique of the purported balance maintained in the legislation).

³³⁴ What if the feared "lock up" of works occurs not merely with cookbooks and jazz recordings, but across the board as to all works? In that event, the evil against which this exception is aimed would be at its most severe. Ironically, however, the Register of Copyrights would be powerless to act, inasmuch as the authority to issue regulations applies only as to "a particular class of works." 17 U.S.C. § 1201(a)(1)(B) (Supp. IV 1998). In such a catastrophic event, however, hopefully new congressional intervention would be soon forthcoming. As one witness commented, "this Congress doesn't go away and this committee does not go away" even after the legislation is passed. See *The WIPO Copyright Treaties Implementation Act: Hearing Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. of Commerce*, 105th Cong. 86 (1998) (testimony of George Vradenburg III, Senior Vice President and General Counsel, America Online, Inc.).

positively applauded—for it is necessary to vindicate the statute's policies, with respect to all but the most technically sophisticated users of copyrighted materials.

Nonetheless, the statute as drafted bars Sally from aiding Harry because the user exemption applies solely to the basic provision and not to the coordinate trafficking ban.³³⁵ Sally's conduct in aid of Harry would seem to violate each of the three particulars of that latter ban, and thus to be triply barred. In particular, it:

(1) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under [U.S. copyright law];

(2) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under [U.S. copyright law]; or

(3) 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 [U.S. copyright law].³³⁶

The problem in the statutory drafting is that none of the features quoted above contains an exception for a particular class of works to which consumers are denied access. Harry needs access to a work that is locked up; for that reason, Congress included a specific exemption to the basic provision of the three anti-circumvention bans. The only methodology that would afford Harry that right (short of putting him through years of schooling to develop his hacking skills up to world-class standards) is defined by the statute as trafficking. Unfortunately, Congress failed to include any complementary exemption to the trafficking ban in order to protect the likes of Harry! Because Harry

³³⁵ See *supra* Parts II.C.2.b, III.C.2.c (discussing the application of the user exemption and the delayed effective date of the circumvention ban, inapplicable to the trafficking ban).

³³⁶ 17 U.S.C. § 1201(a)(2). One witness urged Congress to solve problems arising out of regulating behavior rather than technology, see *supra* Part II.A (discussing the DMCA's focus on actions taken by people as opposed to technology), by adding 12 words to the preamble for the trafficking ban: "For the purpose of facilitating or engaging in an act of infringement." 1997 *Hearings, Serial No. 33, supra* note 90, at 250 (statement of Christopher Byrne, Director of Intellectual Property, Silicon Graphics). As Byrne elaborated, "[w]e don't want black boxes out there that are only designed to steal intellectual property. When we cast that net, let's catch the tuna, but let's not drown the dolphins." *Id.* Ignoring that plea, Congress declined to adopt the proposed preamble (or another equivalent formula), thereby ensnaring Sally and fellow cetaceans.

needs help precisely “for the purpose of circumventing a technological measure that effectively controls access to a work protected under [U.S. copyright law],”³³⁷ the peculiar upshot is that Sally would fall afoul of the ban on trafficking by helping Harry to act exactly within the scope of the user exemption.

Part of this state of affairs is eminently understandable. The need for balance here is, on the one hand, for the likes of Carol, David, and Harry who want access to a discrete category of works, and on the other hand, to proprietors who want to protect the vast bulk of works that may legitimately remain under lock and key. If a black box can lawfully be put on the market because it serves the narrow interests of Carol, David, and Harry that the law protects, then it can be sold to anyone. At that point, the exception threatens to swallow the rule, and the elaborate structure of section 1201 could be rendered nugatory.

Nonetheless, the trafficking ban reaches too far to serve its stated purpose. Returning to our JazzExtract device, whose only purpose is to unlock 1920 recordings, there would be no need to suppress that particular machine, as consumers could not use it for a prohibited purpose.³³⁸ More pointedly, if Harry hires Sally not to develop a machine that could be used generally for the nefarious goal of disabling general protections, but solely to hack into a digitally wrapped file entitled *Scott.Joplin.Recordings*—pursuant to regulations that specifically authorize him to do so—then there is no reason at all to bar that conduct. To the contrary, Sally’s conduct vindicates the lengthy mechanism inserted into the statute in order to protect adversely affected users.³³⁹ Further, the narrow focus of Sally’s hacking means that, by definition, it cannot be subverted in the hands of third parties to defeat legitimate rights. In short, the reach of the trafficking ban is unjustifiably broad; Congress should have reconciled the trafficking ban with the exemptions that it placed on the basic provision.³⁴⁰

³³⁷ 17 U.S.C. § 1201(a)(2)(A).

³³⁸ One witness claimed that the Commerce Department considered “a provision that would have provided a fair use exemption for devices that were limited to fair use uses, and, basically, they came to the conclusion that, kind of, too cute by half, because there isn’t such a technology that exists.” *1997 Hearings, Serial No. 33, supra* note 90, at 231 (testimony of Hilary Rosen).

³³⁹ See *supra* Part II.C.2.b (discussing the extent to which adversely affected individuals qualify for exemption from the anti-circumvention provision).

³⁴⁰ The same problem afflicts the library exemption. See 3 NIMMER, *supra* note 4, at § 12A.04[A][1] (explaining the scope of the library exemption). Although qualifying libraries are privileged to browse works without authorization under applicable conditions, their retention of Sally to facilitate the process places her in violation of the traf-

* *

By contrast to how Congress half-heartedly legislated protection to user interests in section 1201, consider how Congress actually followed through to reconcile the various anti-circumvention bans with respect to other interests safeguarded by section 1201. For instance, the statute creates an exception from the basic provision for the purpose of engaging in encryption research.³⁴¹ Standing alone, that safe harbor would be as feckless as the one protecting Harry. For the erstwhile researcher would only be allowed to act on his own, without benefit of help from others, such as Sally. For that reason, Congress also inserted into the statute a parallel exception from the trafficking ban for the purpose of facilitating encryption research.³⁴² The self-conscious goal of that latter addition was to permit "a person to provide such technological means to another person with whom the first person is collaborating."³⁴³

The same dynamic applies to the exception safeguarding reverse engineering;³⁴⁴ Congress recognized in that context "that, in certain instances, it is possible that a person may need to develop special tools to achieve the permitted purpose of interoperability."³⁴⁵ The contrast is striking between fully protected arenas, such as encryption and reverse engineering,³⁴⁶ and the user exemption invoked by Harry and Sally, which is not excepted from the trafficking ban as it is from the

ficking ban. Nonetheless, if a qualifying library assigns one of its own staff members to the job instead of hiring Sally, the conduct probably stands beyond reproach. *See supra* note 327 and accompanying text (comparing the protection available to an employee to the lack of such protection for a third party).

³⁴¹ *See supra* Part II.D.1 (stating that encryption is exempted from the basic anti-circumvention provision).

³⁴² *See supra* Part II.D.1 (stating that encryption is exempted from the ban on trafficking).

³⁴³ COMMERCE REP. (DMCA), *supra* note 46, at 44.

³⁴⁴ Section 1201 contains an exemption from the basic provision to engage in reverse engineering. *See supra* Part II.D.1. It separately sets forth a complementary exemption from the trafficking ban, to facilitate that first species of conduct. *See supra* Part II.D.1.

³⁴⁵ COMMERCE REP. (DMCA), *supra* note 46, at 43. "The ability to rely on third parties is particularly important for small software developers who do not have the capability of performing these functions in-house. This provision permits such sharing of information and tools." *Id.* That language would appear equally applicable to the Harrys and Sallys of the world.

³⁴⁶ The same dynamic applies as well to security testing, which likewise incorporates a trafficking exemption to complement the exemption from the basic provision. *See supra* Part II.D.1.

basic provision. Congress, in short, neglected to furnish the same measure of protection to adversely affected users as it did to other categories of users to whom it wished to show solicitude.

By the same token, Congress failed to adopt in this context the safeguards that it incorporated into other portions of the Digital Millennium Copyright Act. Instead of restricting liability to those who induce or collude with bad actors, as it did in the Vessel Hull Design Protection Act,³⁴⁷ Congress defined the trafficking aspect of section 1201 to reach the Sallys and Lisas of the world, along with the Teds. Instead of acknowledging that the anti-circumvention reach of section 1201 called forth the need for self-help among those whose rights elsewhere in the Copyright Act would otherwise be overborne, as it did in adjusting the ephemeral recordings exemption,³⁴⁸ Congress deliberately failed to incorporate a fair use exemption here. The result of these juxtapositions seems to be a conscious contraction of user rights.

WRAP-UP

Congress enacted section 1201 based on its perception that "the digital environment poses a unique threat to the rights of copyright owners."³⁴⁹ Even if that threat is unique, however, it scarcely arises in a vacuum.³⁵⁰ The tension between property rights and user-access rights does not loom from the approaching digital millennium; it has been a ceaseless part of the millennium now ending.³⁵¹

The lengthy analysis of how section 1201 works in practice leads to the conclusion that its entire edifice of user exemptions is of doubtful puissance. The user safeguards so proudly heralded as securing balance between owner and user interests, on inspection, largely fail to achieve their stated goals. If the courts apply section 1201 as written,

³⁴⁷ See *supra* Part III.B.2 (discussing the Vessel Hull Design Protection Act and its provisions limiting liability as to sellers and distributors).

³⁴⁸ See *supra* notes 183-84 and accompanying text (explaining that, although the Act does not provide a right of action against a copyright owner who fails to make available the necessary means for making a copy of an ephemeral recording, it does afford self-help by shielding a user from liability for an anti-circumvention violation in that context).

³⁴⁹ COMMERCE REP. (DMCA), *supra* note 46, at 25.

³⁵⁰ See, e.g., Nimmer, *Brains and Other Paraphernalia of the Digital Age*, *supra* note 25, at 31 ("[W]e have little choice but to use yesterday's heritage as the launch point to address tomorrow's needs.").

³⁵¹ See *supra* Part I (tracing public policy issues of access and copying from the Rif in the eleventh century).

the only users whose interests are truly safeguarded are those few³⁵² who personally possess sufficient expertise to counteract whatever technological measures are placed in their path.³⁵³

This defect is not a small one. Many legislators characterized the Digital Millennium Copyright Act as "probably one of the most important bills that we have passed this Congress."³⁵⁴ The fair use issue constitutes "one of the most important provisions of this legislation."³⁵⁵ Accordingly, it is a source of disappointment to be forced to disagree with the conclusion that Congress "mastered the intricate details of this complex subject and has produced a balanced result."³⁵⁶

Nonetheless, harm from that defect is not inexorable. For the pay-per-use world is not inevitable—for one thing, the technology to develop it may never come to bear.³⁵⁷ Even if it did, market factors might preclude its exploitation.³⁵⁸ Accordingly, the instant Wrap-Up cannot tie all the loose ends together. Only the passage of many years, decades in all probability, can reveal the ultimate contours of the world that the Digital Millennium Copyright Act will actually govern.³⁵⁹

³⁵² In addition, the likes of Goliath Corp. arguably find protection for all their employees, humanists and techies alike. See *supra* note 327 (illustrating how, presumably, the actions of employees are imputed to their employer, who is exempted from liability).

³⁵³ See *supra* Part III.C.4 (providing hypotheticals showing how § 1201 affects those with and those without sufficient technological expertise).

³⁵⁴ 144 CONG. REC. H10618 (daily ed. Oct. 12, 1998) (remarks of Rep. Stearns); see also 144 CONG. REC. S11889 (daily ed. Oct. 8, 1998) (remarks of Sen. Hatch) ("[T]he DMCA is one of the most important bills passed this session . . .").

³⁵⁵ 144 CONG. REC. H7094 (daily ed. Aug. 4, 1998) (remarks of Rep. Bliley); see also 144 CONG. REC. E2144 (daily ed. Oct. 13, 1998) (remarks of Rep. Tauzin) (asserting that the fair use exception is "the most important contribution that we made to this bill").

³⁵⁶ 144 CONG. REC. H7096 (daily ed. Aug. 4, 1998) (remarks of Rep. Boucher).

³⁵⁷ See *supra* Part III.C.1 (arguing that one possible future, where lending libraries continue to flourish, may moot concern about fair use in the digital world). The architecture of the Internet will weigh heavily in this equation. See LESSIG, *supra* note 325, at 30-42.

³⁵⁸ "In fact, there is some indication that copyright owners are nervous about their ability to impose technological controls to the full extent that they would like." Cohen, *supra* note 232, at 520. Even if the copyright owners tried to impose such schemes, consumers might resist or reject them. See *id.* at 523 (providing examples of consumers' ability to affect product offering in high tech markets). Consumers' prospects for success in that endeavor will rise, to the extent that the Internet of the future embodies open code. See LESSIG, *supra* note 325, at 100-08.

³⁵⁹ See Nimmer, *Puzzles of the Digital Millennium Copyright Act*, *supra* note 1, at 465 (indicating that future problems in digital copyright issues cannot now be entirely known).

In the event that future technology and business models do indeed converge to produce such a pay-per-use world, then the structure of section 1201, notwithstanding pious protests to the contrary, cannot meaningfully serve as the tool to defeat universal pay-per-use and de facto perpetual protection. Instead, courts at that juncture would be called upon to apply section 1201 to that world of the future—whether by upholding it exactly as written, by interpolating³⁶⁰ into it additional exceptions to give substance to the user exemption that it already contains,³⁶¹ or by making the determination that protection for user rights (traditionally protected in the analog world through such devices as fair use³⁶² and the first sale doctrine) rises to constitutional³⁶³ levels.³⁶⁴

In any event, the issues ventilated herein seem unlikely to disap-

³⁶⁰ Both the first sale doctrine and the fair use defense began as judicial constructions that Congress later codified. See *Quality King Distribs., Inc. v. L'Anza Research Int'l, Inc.*, 523 U.S. 135, 140 (1998) (“[W]e first endorsed the first sale doctrine in a case involving a claim by a publisher that the resale of its books at discounted prices infringed its copyright on the books.”); *Castle Rock Entertainment, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 141 (2d Cir. 1998) (“Until the 1976 Copyright Act, the doctrine of fair use grew exclusively out of the common law.”). It remains to be seen whether courts may apply their common law powers to fashion a type of fair use defense to the anti-circumvention strictures of § 1201, independent of the fair use defense that § 107 codifies as to copyright infringement.

³⁶¹ “Courts interpreting section 1201 may either be forced to find liability in some situations in which it would be inappropriate to impose it or to stretch existing limitations. Congress may eventually need to revise this provision to recognize a broader range of exceptions.” Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 *BERKELEY TECH. L.J.* 519, 538 (1999).

³⁶² It is to be noted that the Supreme Court recently had occasion to state that “[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, ‘[t]o promote the Progress of Science and the useful Arts’” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

³⁶³ Congress's efforts in parallel domains have not fared well under constitutional challenges. See *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (striking down provisions of the Communications Decency Act of 1996, 47 U.S.C. § 223 (1994 & Supp. 1997), as unconstitutional); *ACLU v. Reno*, 31 F. Supp. 2d. 473, 497-98 (E.D. Pa. 1999) (striking down the Child Online Protection Act, 47 U.S.C.A. § 231 (West Supp. 1999), as unconstitutional).

³⁶⁴ See *supra* notes 230-31 and accompanying text (discussing practical implications in assessing whether users rights rise to constitutional levels). It is impossible to address, at enactment of the WIPO Treaties Act, what the resolution might be, in a future world, of a First Amendment challenge to technologies alleged to lock up works of public interest. For early ruminations on the subject, see Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 *N.Y.U. L. REV.* 354, 420-29 (1999) (averring that anti-device feature of § 1201 effectively violates freedom of the press, if not freedom of speech, and should be stricken on that basis).

pear quickly. They express conflicts latent in works of authorship and the tug-of-war that they generate between property rights and notions of access founded on public policy. Previous legal systems confronted those conflicts even before the advent of copyright protection, as demonstrated by the Rif and the Rema. Those sages' positions are carried forward by heirs to each tradition battling before the U.S. Congress. It should not surprise us to realize that these issues of public policy are destined to remain with us into the next millennium as well.