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**Decrypting DMCA § 1201 in the Wake of the Ninth Circuit's
Ruling in *MDY Industries v. Blizzard Entertainment***

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By Michael Czolacz*

I. INTRODUCTION

¶1 Congress enacted the Digital Millennium Copyright Act (DMCA) in order to facilitate the transition to legal distribution of copyrighted materials over the internet.¹ Section 1201, which has been described as the heart of the DMCA,² facilitates this goal by establishing three new causes of action that copyright holders may bring against individuals who bypass electronic measures protecting copyrighted materials and those who assist these individuals.³

¶2 The enactment of these anti-circumvention provisions has resulted in unintended consequences when applied in the context of what has been referred to as “aftermarket parts” cases.⁴ Aftermarket parts cases involve products that interact with products that are created by another manufacturer and are protected by technological protection measures. The manufacturer of the protected product sues the manufacturer of the compatible product for violating § 1201’s ban on the circumvention of technological protection measures. The first of these cases to reach a federal appellate court led the Federal Circuit to adopt an essentially non-textual requirement. To establish liability under § 1201, the copyright owner must demonstrate a nexus between the circumventor’s actions and traditional copyright infringement of one of the exclusive rights of copyright owners protected under § 106 of the Copyright Act.⁵

¶3 In late 2010, the Federal Circuit’s construction of § 1201 was rejected by the Ninth Circuit, which declined to adopt the nexus requirement.⁶ The Ninth Circuit concluded that § 1201’s anti-circumvention provisions created a new property right against circumvention distinct from the traditional exclusive rights of copyright owners enumerated in § 106.⁷ The Ninth Circuit’s approach facilitates “aftermarket parts” litigation and gives copyright owners greater legal control of their copyrighted material if they protect that material with electronic security measures than the same copyright owners would have over their material if no electronic security measures were employed.

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¹ See David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 680-81 (2000).

² *Id.* at 704.

³ 17 U.S.C. § 1201 (2006).

⁴ Lindsey M. Shinn, *Passwords and Keys under the DMCA: A Call for Clarification from the Courts or Congress*, 60 HASTINGS L.J. 1173, 1179-80 (2009).

⁵ See *Chamberlain Grp., Inc. v. Skylink Tech., Inc.*, 381 F.3d 1178 (Fed. Cir. 2004).

⁶ See *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928 (9th Cir. 2010).

⁷ See *id.*

If the Ninth Circuit's approach prevails, the owners of copyrighted software protected with electronic security measures will be able to bring cases against rival manufacturers who design products that interact with the products created by the copyright owners.

¶4 This comment analyzes and critiques this circuit split regarding the nexus requirement for establishing liability under § 1201. It begins by analyzing the statutory provisions at issue, proceeds to a discussion of the holding and rationale of both the Federal Circuit and the Ninth Circuit decisions, and finally advocates for a position that reconciles the Federal Circuit's functionalist approach with the Ninth Circuit's textualist approach. This position would call for the judicial adoption of a limited definition of the statutory term "access" in § 1201, which has gone undefined up to this point.

¶5 This comment is organized into several sections. Section II of this comment reviews the traditional exclusive rights of copyright owners under § 106 of the Copyright Act and discusses the relevant statutory provisions of the DMCA. Section III illustrates the intended application of § 1201 of the DMCA by reviewing the Second Circuit's decision in *Universal Studios vs. Corley*,⁸ the first federal appellate decision construing the DMCA. Section IV reviews the holding and rationale of *Chamberlain Group, Inc. v. Skylink Technologies Inc.*,⁹ in which the Federal Circuit adopted a non-textual nexus requirement into § 1201(a). Section V reviews the reasoning in *MDY Industries, LLC v. Blizzard Entertainment, Inc.*,¹⁰ the recent Ninth Circuit opinion rejecting the Federal Circuit's rationale in *Chamberlain*. Section VI analyzes the merits of these two approaches and argues that the positions of the two circuit courts can be reconciled via the adoption of a more restrictive definition of the statutory term "access" in § 1201. The definition excludes purely mechanical interaction between technologies, which facilitates interoperability, but does not result in individuals gaining audio or visual access to copyrighted material. Section VII considers the merits of and ultimately rejects the viability of two alternative means of reconciling the positions of the two circuits: a liberal construction of § 1201(f)'s reverse engineering exception or a reliance on the purchaser/licensee distinction to distinguish the Ninth Circuit's holding. Finally, Section VIII considers the potential constitutional questions that may be raised should the Supreme Court elect to grant certiorari in order to resolve the circuit split.

II. THE STATUTORY FRAMEWORK: SECTIONS 106 AND 1201 OF THE COPYRIGHT ACT

A. *The Traditional Rights of Copyright Owners Under § 106 of the Copyright Act*

¶6 Traditionally, the exclusive rights of copyright owners have been limited to those enumerated in § 106 of the Copyright Act.¹¹ These rights include: (1) the right to reproduce copies of the copyrighted work, (2) the right to prepare derivative works based upon the copyrighted work, (3) the right to distribute copies of the copyrighted work to the public, and (4) the right to perform and display the work publicly.¹² Individuals who

⁸ 273 F.3d 429 (2d Cir. 2001).

⁹ 381 F.3d 1178 (Fed. Cr. 2004).

¹⁰ 629 F.3d 928 (9th Cir. 2010).

¹¹ 17 U.S.C. § 106 (2006).

¹² *Id.*

violate these exclusive rights and individuals who knowingly facilitate the infringement of these rights are liable for copyright infringement under § 501 of the Copyright Act.¹³

¶7 Notably, these traditional rights do not result in the imposition of liability on individuals who merely view or listen to copyrighted work without paying for it. Consequently, an individual who reads a copyrighted book at the bookstore or views copyrighted material which has been posted on a website is not liable for copyright infringement under § 106.

B. Understanding and Differentiating DMCA § 1201's Anti-Circumvention Provisions

¶8 Section 1201(a) of the DMCA contains three distinct, but similarly worded causes of action. Cases that construe the DMCA typically do so by first analyzing the relationship between the three provisions. Section 1201(a)(1)(A) provides: No Person shall circumvent a technological measure that effectively controls access to a work protected under [Title 17 – the Copyright Act].¹⁴ Section 1201(a)(2)(A) provides:

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 effectively controls access to a work protected under [Title 17 – United States Copyright Law].¹⁵

Sections 1201(a)(2)(B) and (C) extend this ban to products with only limited commercial purpose other than circumvention and to products marketed by a person who knows the product will be used to circumvent technological measures.¹⁶

¶9 Sections 1201(a)(3)(A) and (B) define two key statutory phrases employed in §§ 1201(a)(1) and (a)(2). “To ‘circumvent a technological measure’ means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure without the authority of the copyright owner, to gain access to the work.”¹⁷ “A technological measure ‘effectively controls access to a work’ if the measure, in the ordinary course of its operation, requires the application of information or a process or a treatment, with the authority of the copyright owner, to gain access to the work.”¹⁸

¶10 Although worded similarly to § 1201(a)(2)'s anti-trafficking provision, § 1201(b)(1)(A) introduces a third cause of action and prohibits slightly different conduct:

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*

¹³ *Id.* § 501.

¹⁴ *Id.* § 1201(a)(1)(A).

¹⁵ *Id.* § 1201(a)(2)(A).

¹⁶ *Id.* § 1201(a)(2)(B)-(C).

¹⁷ *Id.* § 1201(a)(3)(A).

¹⁸ *Id.* § 1201(a)(3)(B).

*afforded by a technological measure that effectively protects a right of a copyright owner.*¹⁹

Whereas § 1201(a)(2) prohibits the trafficking in devices that facilitate unauthorized access to protected works, § 1201(b)(1) prohibits the trafficking of devices that circumvent technological measures implemented to protect the traditional § 106 exclusive rights of copyright owners.

¶11 The differences between these statutory provisions are best illustrated by an example. Suppose Bob was the legal owner of a DVD containing a copyrighted movie. This DVD was protected by software preventing Bob from making copies of the DVD. Bob purchases a program from Fred that Fred promises will bypass this anti-copying software, allowing Bob to make copies of the DVD. In this example, Fred is liable under § 1201(b)(1) because the software he sold was designed to allow the DVD to be copied and the copying of copyrighted material is forbidden under § 106. Fred would not be liable under § 1201(a)(2) because the software he is marketing does not facilitate unauthorized access, as the DVD's owner, Bob, who lawfully purchased the DVD, already has the right to access its content.

¶12 Section 1201 also contains a plethora of exceptions to the three causes of action established in §§ 1201(a) and (b). Section 1201(d) permits libraries to gain access to commercially exploited copyrighted work in order to make a good faith determination of whether or not to acquire a copy of that work.²⁰ Section 1201(f) permits a person who has lawfully obtained the right to use a computer program to circumvent a technological measure solely for the purpose of identifying and analyzing the elements of the program that are necessary to achieve interoperability with an independently created computer program.²¹ Section 1201(a)(1)(C) empowers the Librarian of Congress to make regulations creating exceptions to § 1201(a)(1)(A) for persons who are "adversely affected . . . in their ability to make non-infringing uses under this title of a particular class of copyrighted works."²²

¶13 Violators of the anti-circumvention provisions in § 1201 are subject to the civil remedies in § 1203²³ and may be subject to additional criminal penalties if they acted willfully and for the purposes of commercial gain.²⁴ The civil remedies available include: (1) temporary and permanent injunctions,²⁵ (2) actual damages,²⁶ (3) statutory damages between \$200 and \$2,500 per act of circumvention,²⁷ and (4) extra damages for repeated violators.²⁸

¹⁹ *Id.* § 1201(b)(1)(A) (emphasis added).

²⁰ *Id.* § 1201(d).

²¹ *Id.* § 1201(f).

²² *Id.* § 1201(a)(1)(C).

²³ *Id.* § 1203(a).

²⁴ *Id.* § 1204(a).

²⁵ *Id.* § 1203(b)(1).

²⁶ *Id.* § 1203(c)(1)(A).

²⁷ *Id.* § 1203(c)(3)(A).

²⁸ *Id.* § 1203(c)(4).

III. *UNIVERSAL STUDIOS V. CORLEY*: THE DMCA AS APPLIED TO PREVENT THE UNAUTHORIZED DISTRIBUTION OF DIGITAL CONTENT

¶14 *Universal Studios Inc. v. Corley*,²⁹ the first federal appellate case requiring an analysis of § 1201, illustrates the application of § 1201's provisions in the context that Congress originally intended. The technological protection measure at issue in *Corley* was the Content Scrambling System ("CSS"). CSS was an encryption algorithm designed and used by film studios to allow DVDs to be played while preventing them from being copied or otherwise manipulated.³⁰ To combat CSS protection, a group of hackers created "DeCSS," a computer program with the sole function of decrypting the CSS protection of DVDs. This program would allow DeCSS users to create unauthorized copies of the copyrighted DVDs in violation of § 106.³¹

¶15 Defendant Corley operated 2600.com, a website about computer hacking³² and posted an article on this site discussing DeCSS. This article contained both the object and source code of DeCSS.³³ Universal Studios and several other studios that distribute DVDs protected by CSS sued Corley alleging a violation of § 1201's anti-trafficking provisions: §§ 1201(a)(2) and (b)(1).³⁴ Because CSS protects against the creation of copies—an exclusive right of copyright owners under § 106—and DeCSS exists exclusively to circumvent CSS, Corley presumably violated § 1201(b)(1) by posting DeCSS on his website.³⁵ The Second Circuit interpreted the distinction between § 1201(a)(2) and § 1201(b)(1) as differentiating between the ability to control access to copyrighted material and the ability to prevent copying of that material.³⁶ Despite correctly distinguishing between these two provisions earlier in its opinion, the Second Circuit affirmed the trial court's finding of liability under § 1201(a)(2)(A)'s anti-access provision, instead of applying § 1201(b), suggesting the difficulty courts have had differentiating between these two provisions.³⁷

¶16 *Corley* is notable primarily for illustrating § 1201's intended context: cases involving the trafficking in technologies that can lead to the illegal copying and viewing of copyrighted works that have been distributed to the public. Ironically, after *Corley*, most of the federal appellate cases involving DMCA have occurred *outside* of this context.

IV. THE DMCA OUTSIDE OF ITS TRADITIONAL CONTEXT: THE FEDERAL CIRCUIT ADOPTS A NEXUS REQUIREMENT IN § 1201(A)(2) IN *CHAMBERLAIN V. SKYLINK*

¶17 The Federal Circuit was first required to consider the proper application of § 1201 in *Chamberlain Group v. Skylink Tech, Inc.*,³⁸ a case outside the traditional context of

²⁹ 273 F.3d 429 (2d Cir. 2001).

³⁰ *Id.* at 436.

³¹ *Id.* at 437-38.

³² *Id.* at 439.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 441.

³⁷ *Id.*

³⁸ 381 F.3d 1179 (Fed. Cir. 2004).

copyright infringement. In *Chamberlain*, the plaintiff, the Chamberlain Group, manufactured a line of garage door openers that were protected by a copyrighted “rolling code” computer program that constantly changed the transmitter signal needed to open the garage door as a security measure and activated the garage door motor once it detected the correct code.³⁹ The defendant, Skylink Technologies, manufactured a universal garage door opener that was compatible with the plaintiff’s openers, but did not infringe Chamberlain’s copyrighted code.⁴⁰ Chamberlain alleged that by marketing a product capable of bypassing its “rolling code program,” a technological measure that controlled access to the portion of its program that operated the garage door, Skylink violated § 1201(a)(2).⁴¹ Chamberlain did not allege that Skylink’s actions constituted either copyright infringement or contributory copyright infringement.⁴²

¶18 The Federal Circuit refused to hold Skylink liable and adopted a requirement that any plaintiff alleging a violation of § 1201(a)(2) must establish, *inter alia*, that the conduct circumventing an access measure infringes or facilitates the infringement of an exclusive right of copyright owners enumerated in the Copyright Act.⁴³ The court articulated several reasons for this conclusion.

¶19 First, the Federal Circuit began with a textual analysis, noting that the definitions of the phrases, “circumvent a technological measure” and “effectively controls access to a work” established in §§ 1201(a)(3)(A) and (B) both require that these actions be performed “without the authority of the copyright owner.”⁴⁴ However, the court noted that the authority of the copyright owner, with respect to copyrighted work that has been made available to the public, is limited to the exclusive rights, established in § 106, that the copyright owner retains once the work is distributed to the public. *A fortiori*, the court concluded that a copyright owner’s “authority” under § 1201 does not include the authority to restrict the public from taking any actions beyond those actions which would implicate a right retained by the copyright owner under § 106.⁴⁵ Therefore, the court concluded that devices, such as Skylink’s universal garage door opener, that circumvent measures preventing access, but do not infringe or facilitate infringement, cannot be said to be undertaken “without the authority of the copyright owner” because copyright owners have no authority to restrict the actions at issue in the first place.⁴⁶ Consequently, the court determined that circumvention measures which do not constitute copyright infringement cannot be undertaken “without the authority of the copyright owner” under the statute, making § 1201(a) inapplicable unless the circumvention at issue was committed in order to facilitate traditional copyright infringement.

¶20 The court noted that adopting a construction of the statute that did not require a nexus would implicitly create a new right for copyright holders, creating two distinct copyright regimes. One of these regimes would govern the rights of copyright holders who did not employ technological measures under § 106. The second regime would

³⁹ *Id.* at 1184.

⁴⁰ *Id.* at 1183.

⁴¹ *Id.* at 1185.

⁴² *Id.*

⁴³ *Id.* at 1203.

⁴⁴ *Id.* at 1182-83.

⁴⁵ *Id.* at 1200.

⁴⁶ *Id.*

govern copyright owners who employed technological measures to protect their work, and would give copyright owners “unlimited rights to hold circumventors liable under § 1201 merely for accessing that work, even if that access enabled only those rights that the Copyright Act grants to the public.”⁴⁷

¶21 The Federal Circuit went on to conclude that this second regime would be problematic for three reasons. First, it would conflict with antitrust laws and copyright misuse laws by creating after-market monopolies for any manufacturer who employed copyrighted software in its products and protected those products with a technological measure restricting access.⁴⁸ Second, this interpretation would be internally inconsistent with § 1201(c)(1) of the DMCA, which provides that: “[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use under this title” by creating new rights for copyright owners.⁴⁹ Third, this construction would prevent consumers from engaging in explicitly fair uses of the products that they purchased because any non-infringing work or conduct that facilitates infringement constitutes fair use.⁵⁰

V. THE NINTH CIRCUIT REJECTS THE FEDERAL CIRCUIT’S CONSTRUCTION OF § 1201 IN *MDY INDUSTRIES V. BLIZZARD ENTERTAINMENT*

¶22 In *MDY Industries, LLC v. Blizzard Entertainment, Inc.*,⁵¹ the *Chamberlain* court’s analysis was rejected by the Ninth Circuit, which enthusiastically adopted the “two copyright regimes” construction of § 1201 that was criticized by the Federal Circuit in *Chamberlain*. The copyrighted material at issue in *MDY* involved World of Warcraft (WoW) a “massively multiplayer online roleplaying game” in which players create avatars that virtually interact with each other and their environment virtually on servers maintained by the game’s creator, Blizzard Entertainment.⁵² Playing WoW requires both the purchase of the game’s client software and the payment of a monthly subscription fee in order to retain access to the game’s servers. Access to these servers is conditioned upon each player’s approval of Blizzard’s Terms of Use Agreement.⁵³

¶23 The defendant, MDY Industries, manufactured and sold “Glider,” a program that interacted with WoW by allowing the game’s players to advance their avatars without requiring the players to be physically present at their computers.⁵⁴ In an effort to prevent this conduct, Blizzard designed and launched “Warden,” a program designed to detect Glider and block players who were running Glider from connecting to Blizzard’s servers.⁵⁵ MDY then modified Glider to avoid detection by Warden.⁵⁶ This response, in turn, led Blizzard to sue MDY, alleging several theories of liability: (1) contributory copyright infringement for inducing WoW’s players to violate the term of use prohibiting

⁴⁷ *Id.*

⁴⁸ *Id.* at 1201.

⁴⁹ *Id.* at 1202.

⁵⁰ *Id.*

⁵¹ 629 F.3d 928 (9th Cir. 2010).

⁵² *Id.* at 935.

⁵³ *Id.*

⁵⁴ *Id.* at 935.

⁵⁵ *Id.* at 936.

⁵⁶ *Id.*

the use of Glider, (2) §§ 1201(a)(2) and (b)(1) trafficking liability for selling Glider, which circumvented Warden, and (3) tortious interference of contract for inducing Blizzard's subscribers to violate its Terms of Use Agreement, which prohibited the use of Glider.⁵⁷

¶24 The Ninth Circuit began its analysis by addressing Blizzard's copyright infringement claim. Because players' access to Blizzard's servers was conditioned on their approval of Blizzard's terms of use, the court concluded that WoW's players were licensees rather than owners of the game.⁵⁸ In order to establish copyright infringement based on the breach of a licensing agreement governing the use of a copyrighted work, the breach of contract, which is the basis of the claim, must be one that implicates a right protected under U.S. copyright law.⁵⁹ Because the use of Glider by WoW's players did not implicate any of Blizzard's rights relating to its status as a copyright owner, the court concluded that MDY could not be held liable for contributory copyright infringement.⁶⁰

¶25 The court next discussed Blizzard's DMCA claim. Blizzard argued that by marketing Glider, which was designed to bypass Warden, Blizzard's anti-circumvention measure, MDY was liable for violating § 1201(a)(2) and § 1201(b)(1). Because the court had already determined that MDY's conduct did not implicate any right of copyright, it held that Blizzard could not establish a claim under § 1201(b)(1).⁶¹

¶26 The court then addressed Blizzard's § 1201(a)(2) claim. The first obstacle to the application of § 1201(a)(2) in Blizzard's favor was the fact that Warden only restricted players' ability to access Blizzard's servers and not their ability to access the game's copyrighted files, which were stored on players' hard drives.⁶² The district court resolved this issue by conceptually severing the software's copyrighted material into "literal elements" ("the code stored on player's hard drives"), "individual non-literal elements" ("the discrete visual and audible components of the game"), and "dynamic non-literal elements" ("the real-time experience of traveling through different worlds, hearing their sounds, viewing their structures, encountering their inhabitants and monsters, and encountering other players").⁶³ The Ninth Circuit adopted the district court's distinction and concluded that Warden qualified as a "technological measure that effectively controlled access" to a protected work with respect to WoW's dynamic non-literal elements.⁶⁴ Having reached this conclusion, the Ninth Circuit proceeded to construe the provisions of § 1201.⁶⁵

¶27 Had the Ninth Circuit adopted the Federal Circuit's analysis in *Chamberlain*, Blizzard's § 1201(a)(2) claim would have been dismissed for the same reason Blizzard's copyright infringement claim was dismissed: because Glider did not facilitate the violation of any of Blizzard's rights under § 106. Instead, the Ninth Circuit declined to adopt the Federal Circuit's nexus requirement and concluded that § 1201(a)(2) implicitly

⁵⁷ *Id.* at 936.

⁵⁸ *Id.* at 938.

⁵⁹ *Id.* at 940.

⁶⁰ *Id.* at 941.

⁶¹ *Id.* at 954-55.

⁶² *Id.* at 942.

⁶³ *Id.* at 942-43.

⁶⁴ *Id.*

⁶⁵ *Id.*

provides copyright owners who encrypt their works with a new property right against the circumvention of this encryption.⁶⁶

¶28 The Ninth Circuit began by comparing the text of § 1201(a)(2) with the text of § 1201(b)(1).⁶⁷ Since § 1201(b)(1) explicitly relates to a technological measure “that effectively protects the rights of a copyright owner,” whereas § 1201(a)(2) proscribes the circumvention of any technological measure without adopting the language employed in § 1201(b)(1), the court concluded that the textual difference in the statutes imply that no nexus to copyright infringement was required for a § 1201(a)(1) violation.⁶⁸ To the Ninth Circuit, the Federal Circuit’s interpretation rendered § 1201(b)(1) superfluous whereas declining to adopt such a nexus made both provisions meaningful.⁶⁹ The court derived further textual evidence supporting its position from § 1201(a)(3)(A)’s definition of the phrase “circumvent a technological measure,” which provides examples of circumvention that do not necessarily relate to infringement.⁷⁰

¶29 The Ninth Circuit rationalized the absence of a nexus requirement as necessary to facilitate Congress’s desire to prevent trafficking in devices that facilitate the viewing of copyrighted material, which is not a violation of any of the § 106 rights unless that viewing entails making a copy of the work.⁷¹ The Ninth Circuit concluded that constructing the statute without a nexus requirement would further Congress’s goal of facilitating the digital distribution of copyrighted material: one of the stated objectives of the DMCA.⁷²

¶30 The Ninth Circuit then considered and rejected the position adopted by the Federal Circuit in *Chamberlain*.⁷³ The court reconciled its view of the statute with § 1201(c) by acknowledging that § 1201(a) created a new right and stating that this right was unrelated to the rights and defenses preserved in the rest of the copyright statute, and therefore “[did] not disturb the balance between public rights and the traditional rights of copyright owners under the Copyright Act.”⁷⁴ The Ninth Circuit dismissed the Federal Circuit’s antitrust and copyright misuse concerns as not relevant to the instant case because Blizzard was not seeking to put a direct competitor out of business and promised to deal with them in the future should they arise.⁷⁵ The court also noted that any policy concerns could be mitigated by the Library of Congress’s ability to prescribe exceptions to anti-circumvention statutes if it concluded that doing so would further the public interest.

⁶⁶ *Id.* at 945.

⁶⁷ *Id.* at 944.

⁶⁸ *Id.* at 944-46.

⁶⁹ *Id.* at 946.

⁷⁰ *Id.* at 945.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 948.

⁷⁴ *Id.* at 950-51.

⁷⁵ *See id.* at 951 (“Concerning antitrust law, we note that there is no clear issue of anti-competitive behavior in this case because Blizzard does not seek to put a direct competitor who offers a competing role-playing game out of business and the parties have not argued this issue. If a § 1201(a)(2) defendant in a future case claims that a plaintiff is attempting to enforce its DMCA anti-circumvention right in a manner that violates antitrust law, we will consider the interplay between this new anti-circumvention right and antitrust law.”).

VI. ANALYSIS

A. *The Problematic Nature of the Holdings in Chamberlain and MDY*

¶31 Though the Ninth Circuit and the Federal Circuit appear to have reached radically different conclusions, their views can be reconciled more easily than it might first appear. The Federal Circuit's valid desire to prevent aftermarket monopolies led it to adopt a non-textual nexus requirement for § 1201(a). The Ninth Circuit's focus on the discrepancies between the Federal Circuit's approach and the plain language of the statute led it to adopt an unnecessarily broad holding that implicates the valid policy issues that the Federal Circuit expressed concern about in *Chamberlain*.

¶32 Neither court attempted to distinguish between cases in which the unauthorized access at issue involved: (1) an individual circumventing a technological protection measure in order to view protected copyrighted material or (2) a mechanical interaction necessary to facilitate interoperability between devices or software programs with different manufacturers. Part B of this Section advocates that the statutory term "access" should be interpreted in a way that takes this distinction into account.

¶33 As the Ninth Circuit recognized, the legislative history of the DMCA includes examples suggesting liability in cases in which no nexus to copyright infringement exists.⁷⁶ The House Judiciary Committee Report discusses § 1201(a)(2), stating:

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.⁷⁷

Bypassing a password to break into a locked room and view a copyrighted work does not implicate any of the rights enumerated in § 106: the right to reproduce the copyrighted work, the right to prepare derivative works, the right to distribute copies of the work by sale or other transfer of ownership, or the right to perform the copyrighted work. Accordingly, the Federal Circuit's nexus requirement is inconsistent with the intent of Congress, which clearly meant to use § 1201(a)'s causes of action to prevent individuals from using technological measures to view technologically protected copyrighted material intended to be restricted to paying customers. Section 1201 was necessary because this conduct does not infringe upon any of § 106's exclusive rights.

¶34 The Federal Circuit's incorporation of the § 106 rights as a limit on the statutory "authority" retained by copyright holders is also problematic from a textual perspective. Section 1201(a)(3)(A) provides that to "circumvent a technological measure" means to descramble a scrambled work . . . without the authority of the copyright owner." In this provision,⁷⁸ "authority" is undoubtedly used to mean: "with the consent or permission of the copyright owner." There is nothing in the statute suggesting that the term "authority" relates in any way to the rights conferred on copyright owners pursuant to § 106, which appears in a different section of the Copyright Act describing the "exclusive rights" of copyright owners without ever referring to their "authority." The Federal Circuit's incorporation of the § 106 rights meaning of the term "authority" seems especially

⁷⁶ *Id.* at 947.

⁷⁷ H.R. REP. NO. 105-551, pt. 1, at 17 (1998).

⁷⁸ As well as § 1201(a)(3)(B).

strained given that § 1201(b)(1)(A) explicitly refers to conduct which “circumvents a technological measure . . . that effectively protects a right of a copyright owner.” This provision suggests that Congress explicitly intended to incorporate § 106 rights into § 1201 and therefore did not intend to incorporate these rights by other means, such as via the undefined statutory term “authority.”

¶35 The Ninth Circuit’s analytical approach in *MDY* is problematic because it ignores the serious policy consequences articulated by the Federal Circuit in *Chamberlain*. The Ninth Circuit brushed aside the potential antitrust or copyright misuse concerns of the Federal Circuit because they were not implicated by the facts of *MDY*. Any judicial construction of a statute should address concerns raised by all of the classes of cases that arise under that statute, not merely the concerns present in the case providing the occasion for the judicial construction. If another § 1201 case presented concerns not at issue in *MDY* that could only be obviated by adopting a new and conflicting construction of the statute, the Ninth Circuit would be forced to reverse itself.

¶36 The Ninth Circuit’s lack of concern for other cases that could potentially arise under § 1201(a) is especially striking given the unique products at the center of the litigation in *MDY*. Blizzard’s WoW business model requires players to maintain a connection with Blizzard’s servers (and consequently, with the other players connected to these servers) in order to play the game. Most products, even those sold digitally, do not require purchasers to maintain an internet connection with their creator’s servers and other owners of the product in order for the product to function. Moreover, the vast majority of products do not rely on an internal virtual economy to keep their purchasers satisfied, which Blizzard contended *MDY*’s conduct was disrupting by allowing Glider users to stockpile in-game resources while they were away from their computers.

¶37 In short, the typical case that would be determined by the presence or absence of a nexus requirement in § 1201(a) is far more likely to resemble the fact pattern that the Federal Circuit considered in *Chamberlain*, which *did* raise antitrust and copyright misuse concerns, than the fact pattern the Ninth Circuit considered in *MDY*, which did not. Consequently, the Ninth Circuit’s decision seems flawed in that it adopts a statutory construction that creates obvious policy concerns, but then brushes them aside until those concerns are presented in a future case.

¶38 The Ninth Circuit also ignored the policy consequences of not facilitating the creation of products that interoperate with other products designed by a different manufacturer (“interoperable products”). Interoperable products lower entry barriers for inventors because innovations can take advantage of existing infrastructures.⁷⁹ They can also lower the cost of replacement products for consumers by creating competition between manufacturers as opposed to giving the original manufacturer a monopoly over interoperable products and replacements of consumable products. They also allow a wider variety of inventors to try their hand at improving an existing product, rather than limiting the development of a product solely to that product’s manufacturer.⁸⁰ The presence of a competitive market for aftermarket parts is therefore likely to spur innovation.

⁷⁹ Aaron K. Perzanowski, *Rethinking Anticircumvention’s Interoperability Policy*, 42 U.C. DAVIS L. REV. 1549, 1558 (2009).

⁸⁰ *Id.*

B. Reconciliation of the Two Approaches via the Adoption of a More Restrictive Definition of the Statutory Term “Access”

¶39 Since the Ninth Circuit’s textual and legislative history arguments suggesting the absence of a nexus appear to be correct and the Federal Circuit’s policy concerns appear to be well-founded, a construction of the statute that takes both of these considerations into account is needed. Such an approach should not adopt a nexus requirement, while facilitating the bypassing of anti-circumvention measures undertaken for the purpose of achieving interoperability, thereby avoiding the antitrust and copyright misuse concerns raised by the Federal Circuit. This approach must also, of course, be consistent with the language of § 1201 and the terms of art defined therein.

¶40 The desired statutory construction can be achieved by defining the statutory term “access” to include *only* conduct that has the result of allowing an individual (who may or may not be the individual who engaged in the circumvention) to see and/or hear the copyrighted aspects of a work. Such an approach would not violate any statutory language. Although the phrase “effectively controls access to a work” is statutorily defined, the term “access” is neither defined nor associated with any examples of who or what is capable of gaining access in any of the statutory provisions in which it appears.

¶41 Limiting the meaning of the term “access” to encompass only access that results in individuals gaining sensory access would preserve liability in the “breaking into a locked house to gain access to a copyrighted book” examples described in the DMCA’s legislative history because the access in that example is sensory access by an individual.⁸¹ This limitation would also exclude the “access” at issue in *Chamberlain*, which was the acceptance of the transmission of a signal by copyrighted software and did not result in any “access” in the form of unauthorized sensory perception of copyrighted material by an actual individual. Applied to the facts in *MDY*, MDY would still be liable for violating § 1201(a) because Glider allowed Blizzard’s players to circumvent Warden and perceive the dynamic non-literal copyrighted elements of WoW. Limiting the definition of “access” to “access that allows individuals to see or hear copyrighted material” would therefore preserve the holdings of all of the cases involving § 1201(a) as well as the hypothetical example of liability suggested in § 1201(a)’s legislative history. Consequently, the proposed approach would not affect the liability of any of the cases addressed by Congress or the federal appellate courts and provide a basis for reconciling the Federal and Ninth Circuits.

¶42 This approach, of course, assumes that Congress did not intend the DMCA to impose liability in the *Chamberlain* class of cases, a class in which the definition that this comment proposes would prevent a finding of liability. As demonstrated below, both the text and the legislative history of § 1201 support this assumption.

¶43 The legislative history of the DMCA focuses exclusively on aiding the distribution of copyrighted work over the internet and does not suggest any intent to limit the creation of interoperable works.⁸² Furthermore, pre-DMCA law permitted fair use defenses to

⁸¹ See H.R. REP. NO. 105-551, pt. 1, at 17.

⁸² See generally, H.R. REP. NO. 105-551 (1998); S. REP. NO. 105-190 (1998); Nimmer, *supra* note 1, at 716 (characterizing the House and Senate debates prior to the DMCA’s adoption as centering on the issue of whether or not the anti-circumvention provisions restrict too much fair use of copyrighted material).

copyright infringement where the infringement in question was committed for the purpose of designing a program compatible with the copyright owner's code.⁸³

¶44 Further evidence that Congress did not intend to use § 1201(a) to prevent the design of products that operate with copyrighted software can be found in one of § 1201's exceptions to §§ 1201(a) and (b) liability. Section 1201(f)(1) specifically protects reverse engineering performed to achieve interoperability:

Notwithstanding the provisions of subsection (a)(1)(A), a person who has lawfully obtained the right to use a copy of a computer program may circumvent a technological measure that effectively controls access to a particular portion of that program for the sole purpose of identifying and analyzing those elements of the program that are necessary to achieve interoperability of an independently created computer program with other programs, and that have not previously been readily available to the person engaging in the circumvention, to the extent any such acts of identification and analysis do not constitute infringement under this title.⁸⁴

Section 1201(f)'s exemption from liability for circumvention cases, where the circumvention is performed to achieve interoperability, suggests that it values the creation of interoperable devices over its ban on circumvention. The presence of this exemption further evinces the fact that the DMCA was not intended to create the aftermarket monopolies feared by the Federal Circuit. This conclusion is consistent with the antitrust and copyright misuse concerns recognized by the Federal Circuit. The legislative history is also consistent with the conclusion that Congress intended the DMCA to facilitate the distribution of copyrighted works over the internet. It is *that* concern, not any focus on preventing interoperability, that dominated the legislative discussion prior to the DMCA's passage.

VII. TWO ALTERNATIVE APPROACHES FOR RECONCILING *CHAMBERLAIN* AND *MDY*: BROAD CONSTRUCTION OF § 1201(F) AND RELIANCE ON THE PURCHASER/LICENSEE DISTINCTION

¶45 As one scholar has suggested, a liberal construction of § 1201(f) would probably achieve the same goals as those attained by the definition of "access" proposed in this comment.⁸⁵ However, § 1201(f) is too limited to protect interoperability because it only applies to "computer programs" and not a wider range of copyrighted works, such as the garage door opener at issue in *Chamberlain*. It is also unclear whether § 1201(f) protects products that repeatedly circumvent technological protection measures in order to function or whether it only protects circumvention that occurs during the process of creating an interoperable product. Section 1201(f) has also rarely been analyzed by the judiciary,⁸⁶ because courts that adopt the Federal Circuit's approach would have little reason to consider it. In § 1201(a) cases analyzed under the Federal Circuit's

⁸³ See generally *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).

⁸⁴ 17 U.S.C. § 1201(f)(1) (2006).

⁸⁵ See generally Perzanowski, *supra* note 79.

⁸⁶ *Id.* at 1576.

Chamberlain approach—where § 1201(f) could potentially be raised as an affirmative defense—plaintiffs will be unable to satisfy the nexus requirement, rendering § 1201(f) superfluous.⁸⁷

¶46 Unlike §1201(f), the limited definition of “access” advocated in this article preserves interoperability across the spectrum of copyright cases, as opposed to only “computer programs.” The “access” approach is also preferable to the adoption of a broad construction of § 1201(f) because it would preserve judicial efficiency by not requiring the issue to be raised as an affirmative defense, allowing a larger number of cases to be resolved on the pleadings.

¶47 Another potential ground for reconciling *Chamberlain* and *MDY* is that *Chamberlain* involved the circumvention of a technological protection measure in a product that was sold to users, whereas *MDY* involved the circumvention of a product whose access was governed by a license. The possibility of requiring a nexus to copyright infringement in cases involving sales and not requiring a nexus in license cases was not foreclosed by the Federal Circuit in *Chamberlain*, who reserved the issue for possible future consideration.⁸⁸

¶48 However, differentiating between circumvention of measures in products that have been sold and circumvention of measures in products that have been licensed is problematic in several respects.

¶49 First, the DMCA was enacted by Congress to protect the digital distribution of copyrighted materials. Giving licensees additional causes of action for breach of license and giving them access to the DMCA’s generous remedy provisions does not further this goal. As the facts of *MDY* demonstrate, software licenses can be breached in a number of ways that do not implicate software distributors’ ability to securely distribute their products to the public. Furthermore, relying on a licensee/purchaser distinction to reconcile the Ninth and Federal Circuits is also problematic because the federal courts of appeals have adopted divergent standards for determining which conditions imposed upon the use of a product create a valid license.⁸⁹ This could lead to the circumvention of technological protection measures of a product to be actionable under the DMCA in one federal circuit and not another because of different underlying tests for determining what constitutes a valid license. This resolves one federal circuit split by magnifying the effects of another. Additionally, individuals who traffic in products whose only function is to enable the breach of a contract are already liable for tortious interference of contract under state law, which may render extending § 1201(a) protection to licenses largely superfluous.

¶50 Finally, a distinction between the applicability of § 1201(a) to owners and licensees has no textual basis in § 1201 itself. Section 1201 contains no text that distinguishes between whether the technological measure at issue has been used to circumvent a

⁸⁷ 17 U.S.C. § 1201(f) was raised as an affirmative defense in *Chamberlain*, but this issue was never reached by the court because of the nexus requirement.

⁸⁸ *Chamberlain Group, Inc. v. Skylink Tech., Inc.*, 381 F.3d 1178, 1202 n.17 (Fed. Cir. 2004) (“It is not clear whether a consumer who circumvents a technological measure controlling access to a copyrighted work in a manner that enables uses permitted under the Copyright Act but prohibited by contract can be subject to liability under the DMCA. Because *Chamberlain* did not attempt to limit its customers’ use of its product by contract, however, we do not reach this issue.”).

⁸⁹ *Cf. Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010), *with Krause v. Titleserv Inc.*, 402 F.3d 119 (2d Cir. 2005).

license or not. The phrase “works protected under [Title 17]” which establishes the scope of § 1201’s protection, applies to works which have been both sold to the public and licensed to the public. Accordingly, giving § 1201 a broader applicability in cases involving licensed material, as the Federal Circuit’s *Chamberlain* footnote discusses, is an unsatisfying and inadequate means of reconciling *Chamberlain* and *MDY*.

VIII. THE *MDY* APPROACH—TESTING THE LIMITS OF THE COPYRIGHT CLAUSE?

¶51 Should the circuit split regarding the correct construction of DMCA § 1201(a) persist, one of its most significant consequences may be its effect in establishing the scope of the Copyright Clause of the Constitution, which provides: The Congress shall have the power to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.⁹⁰

¶52 In *Chamberlain*, the Federal Circuit alluded to the possible unconstitutionality of the Ninth Circuit’s construction of § 1201(a) when applied to limit the use of interoperable products.⁹¹ As the *Chamberlain* court noted, it is difficult to argue that third-party products that beneficially interact with technologically protected copyrighted works by imposing § 1201(a) liability could promote the arts or sciences.

¶53 The analytical approach employed by the Supreme Court in *Eldred v. Ashcroft* also suggests that the Ninth Circuit’s construction of § 1201(a) may be unconstitutional.⁹² In *Eldred*, the Court held that the law in question was constitutional because it did not “alter the traditional contours of copyright protection.”⁹³ Section 1201(a) as construed by the Ninth Circuit alters the contours of copyright law dramatically by giving the creators of copyrighted materials who employ technological measures to protect those materials a right against unwanted interaction with any product that circumvents those protections. The *MDY* court conceded as much by recognizing that § 1201 creates new rights unprotected in § 106. If the court were to grant certiorari to resolve the § 1201(a) circuit split, doing so could be a vehicle to limit Congress’s exercise of the Copyright Clause; much as it defined the scope of Congress’ ability to exercise the Commerce Clause in *United States v. Lopez*⁹⁴ and *United States v. Morrison*.⁹⁵

IX. CONCLUSION

¶54 Enacting changes to a well-established copyright regime to account for the development of new technologies is not an easy task. This is evident in the fact that the DMCA, which Congress implemented in order to facilitate the distribution of copyrighted

⁹⁰ U.S. CONST. art. I., § 8, cl. 6.

⁹¹ *Chamberlain*, 381 F.3d at 1200 (“[A]s the Supreme Court recently explained, ‘Congress’s exercise of its Copyright Clause authority must be rational’ . . . Chamberlain’s proposed construction of § 1201(a) implies that in enacting the DMCA, Congress attempted to ‘give the public appropriate access’ to copyrighted works by allowing copyright owners to deny all access to the public. Even under the substantial deference due Congress, such a redefinition borders on the irrational.”).

⁹² 537 U.S. 186 (2003).

⁹³ *Id.* at 221.]

⁹⁴ 514 U.S. 549 (1995).

⁹⁵ 529 U.S. 598 (2000).

material over the internet, has given rise to a class of cases not contemplated by the statute. These cases involve plaintiffs, who manufacture a product protected by a technological anti-circumvention measure, suing manufacturers of an unlicensed product that is compatible with the plaintiff's product.

¶55 By construing the statutory concept of "access" to include access that involves only the interaction between two types of software as opposed to restricting "access" to access that facilitates the viewing of a copyrighted work, courts have concluded that this class of cases is actionable under the DMCA. In *Chamberlain*, the Federal Circuit attempted to prevent the adverse policy consequences of the Ninth Circuit's approach by adopting a non-textual element into § 1201(a)(2) claims—the requirement that plaintiffs demonstrate that there was a nexus between the defendant's conduct and traditional copyright infringement. This nexus requirement is problematic because it erases the textual distinction between § 1201(a)(2) and § 1201(b)(1). Furthermore, it permits the trafficking in anti-circumvention devices that allow the unauthorized viewing of digitally protected works. The DMCA's legislative history suggests that this form of unauthorized access was precisely the problem Congress was concerned with when it enacted the DMCA in 1998.

¶56 The unintended consequences of § 1201 liability in interoperability cases can be resolved by distinguishing between the cases brought under § 1201(a) that the statute was meant to apply to, like *Corley*, and those to which it was not—cases analogous to *Chamberlain*. Limiting the meaning of the word "access" to apply only to access that grants individuals the ability to hear or see a technologically protected copyrighted work would allow courts to make this distinction. This approach is consistent with the text of § 1201 since the word "access" is never connected to any subject in any statutory provision in which it appears. This proposed approach would resolve the split between the Ninth and Federal Circuits created by *Chamberlain* and *MDY* and avoid the textual problems presented by the Federal Circuit's nexus requirement and the policy consequences that the Ninth Circuit failed to adequately address.