

THE DMCA ANTI-CIRCUMVENTION PROVISIONS AND THE REGION CODING SYSTEM: ARE MULTI-ZONE DVD PLAYERS ILLEGAL AFTER THE CHAMBERLAIN AND LEXMARK CASES?

Qixiang Sun*

I. INTRODUCTION

Various technological access control measures increasingly protect motion pictures in digital versatile disk (DVD)¹ format. One such technology is the region coding system, which purportedly was designed to prevent a DVD manufactured for sale in one region of the world from playing on a machine not manufactured for sale in that same region.² As a result, consumers might not be able to play DVDs purchased in one region on a device manufactured in another region, permitting movie studios to control the availability of motion picture DVDs in different regions of the world. Relying on a broad but plain language reading of § 1201(a) of the Digital Millennium Copyright Act³ (DMCA), some copyright owners and commentators claim that any circumventing activity or any device enabling circumvention of the region coding system—such as multi-zone DVD players,⁴ which allow users to play DVDs regardless of their region codes—may constitute violations of

* J.D., University of Illinois College of Law, 2006; L.L.M, Nanjing University, 1997; L.L.B., Nanjing University, 1994; M.A. University of Denver, International Studies, 2003.

1. A digital versatile disk is a five-inch wide disk that can be used to store full-length motion pictures in a digital form. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 307 (S.D.N.Y. 2000), *aff'd sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001). “They are the latest technology for private home viewing of recorded motion pictures and result in drastically improved audio and visual clarity and quality of motion pictures shown on televisions or computer screens.” *Id.*

2. U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT 74 n.262 (2001) [hereinafter DMCA REPORT], available at <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>; see also Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64,556, 64,569 (Copyright Office Oct. 28, 2000) (No. RM 99-7D) (to be codified at 37 C.F.R. pt. 201), available at <http://www.copyright.gov/fedreg/2000/65fr64555.pdf> (concluding that the region coding system is an access-control technology).

3. 17 U.S.C. § 1201(a) (2000).

4. Multi-zone DVD players are players that “have been modified by implementing a sequence of button pushes on the player’s remote control, which changes the player’s region code registry.” Comments of the Electronic Frontier Foundation and Public Knowledge at 21 n.77, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62,011 (Copyright Office Oct. 28, 2003) (No. RM 2002-4) [hereinafter Comments], available at <http://www.copyright.gov/1201/2003/comments/035.pdf>.

copyright laws, especially the anti-circumvention provisions of the DMCA.⁵

In *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, the Federal Circuit declined to adopt such a reading of § 1201.⁶ The court noted that adopting such a broad construction of the DMCA would create an absurd result that would threaten many legitimate uses of software in electronic and computer products—something the law aims to protect.⁷ Almost two months later, in *Lexmark International, Inc. v. Static Control Components, Inc.*, the Sixth Circuit vacated a district court's preliminary injunction against a producer of compatible aftermarket printer toner cartridges for violations of § 1201(a)(2).⁸ These two decisions conflict not only with other judicial interpretations,⁹ but also with the plain language of the statute.

This Note argues for a narrow reading of § 1201(a)(2), as found in the *Chamberlain* and *Lexmark* cases, because such an approach better balances the fundamental values of both protecting and sharing copyrighted works. Part II provides background information related to the DVD region coding system, including the DMCA anti-circumvention provisions, and courts' interpretations of those provisions. Part III first analyzes why the *Chamberlain* and *Lexmark* cases give a better understanding of § 1201(a)(2) of the DMCA in terms of statutory interpretation. Part III then states that because multi-zone DVD players do not facilitate infringing use, prohibiting such devices impairs the public's rights to use legitimately acquired property. Part IV suggests that Congress should create a safety valve by allowing the Copyright Office to monitor and evaluate the adverse effect of § 1201(a)(2) on non-infringing circumvention of region coding by lawful owners of DVDs. Considering both the textual support of the DMCA, as noted in the *Chamberlain* and *Lexmark* cases, and the adverse effects on consumers, an exemption for multi-zone DVD players to the DMCA's anti-trafficking provisions will be necessary.

5. See, e.g., Victor F. Calaba, *Quibbles 'N Bits: Making a Digital First Sale Doctrine Feasible*, 9 MICH. TELECOMM. & TECH. L. REV. 1, 23 (2002); Letter from Steven J. Metalitz, Smith & Metalitz LLP, to David O. Carson, Gen. Counsel, U.S. Copyright Office (Aug. 5, 2003), available at <http://www.copyright.gov/1201/2003/post-hearing/post25.pdf>.

6. *Chamberlain Group, Inc. v. Skylink Techs., Inc. (Chamberlain III)*, 381 F.3d 1178, 1197–204 (Fed. Cir. 2004).

7. *Id.* at 1201.

8. *Lexmark Int'l Inc. v. Static Control Components, Inc. (Lexmark II)*, 387 F.3d 522, 529 (6th Cir. 2004).

9. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), *aff'd sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

II. BACKGROUND

A. DMCA Anti-Circumvention and Anti-Trafficking Provisions

Enacted on October 28, 1998, the DMCA aimed to implement two treaties adopted by the World Intellectual Property Organization (WIPO): the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.¹⁰ Both treaties require contracting nations to “provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures [adopted by copyright owners] in connection with the exercise of their rights.”¹¹ Accordingly, the DMCA contains three principal anti-circumvention provisions designed to protect the technology that copyright owners and content providers use to restrict access to and use of their content.

First, § 1201(a)(1)(A) provides, *inter alia*, that no person may “circumvent a technological protection measure” adopted by the copyright owner that “effectively controls access” to a copyright work.¹² As defined in the DMCA, 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.”¹³ To circumvent such a technological measure is “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.”¹⁴

Second, § 1201(a)(2) prohibits manufacturing, importing, or otherwise trafficking in any means that “is primarily designed . . . for the purpose of circumventing a technological measure that effectively controls access to a work . . . [.] has only limited commercially significant purpose or use other than to [so] circumvent . . . [or] is marketed . . . for use in [so] circumventing a technological measure”¹⁵ Section 1201(a) thus addresses only “access-control” measures, prohibiting both circumvention of and trafficking in devices used to circumvent such measures. Once a user is authorized to access a copyrighted work, however, § 1201(a) does not apply to subsequent actions.¹⁶ Consequently, “an individual would not be able to circumvent in order to

10. *Reimerdes*, 111 F. Supp. 2d at 315–16.

11. World Intellectual Property Organization Copyright Treaty art. 11, Dec. 20, 1996, 36 I.L.M. 65, available at http://www.wipo.int/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf; World Intellectual Property Organization Performances and Phonograms Treaty art. 18, Dec. 20, 1996, 36 I.L.M. 76, available at http://www.wipo.int/treaties/en/ip/wppt/pdf/trtdocs_wo034.pdf.

12. 17 U.S.C. § 1201(a)(1)(A) (2000).

13. *Id.* § 1201(a)(3)(B).

14. *Id.* § 1201(a)(3)(A).

15. *Id.* § 1201(a)(2)(A)–(C).

16. H.R. REP. NO. 105-551, pt. 1, at 18 (1998).

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.”¹⁷

Finally, § 1201(b)(1) deals with “rights-control” measures by prohibiting manufacturing, distributing, or trafficking in any device that circumvents a measure that protects a right of the copyright owner.¹⁸ Similar to § 1201(a)(2), one of three conditions must be met for a device to be prohibited under § 1201(b)(1): such device must be “primarily designed” to circumvent, have limited commercial significance other than to circumvent, or be marketed to circumvent a technology that “effectively protects a right of a copyright owner.”¹⁹ As a result, technological measures addressed under § 1201(b) include not only copy-control measures but also any other measures adopted to prevent infringement of the copyright owner’s exclusive rights under § 106 of the Copyright Act.²⁰

It is noteworthy that the DMCA specifically distinguishes between two types of technological control measures: access-control measures and rights-control measures. Access-control measures receive greater protection under § 1201 than do rights-control measures because circumvention only of access-control measures is prohibited under the DMCA.²¹ A person who circumvents an access-control measure violates § 1201(a)(1)(A) and may be subject to civil and criminal liabilities.²² Conversely, there is no comparable provision under § 1201 that specifically bans circumventing rights-control measures because Congress anticipated that such circumvention likely would constitute actionable copyright infringement.²³ In addition, such differentiation is necessary to avoid “penaliz[ing] some noninfringing conduct such as fair use.”²⁴ In other words, the DMCA left regulation of circumvention of rights-control measures to “the traditional copyright rights and the applicable limitations” under § 106 of the Copyright Act.²⁵ Thus, there is no cause of action under § 1201(b) for circumventing a rights-control measure in order to conduct infringing activities with regard to the copyrighted work.²⁶ Instead, the copyright owner should sue the

17. *Id.*

18. 17 U.S.C. § 1201(b)(1). “A right of the copyright owner” refers to any of the rights to reproduce, adapt, distribute, publicly perform, or publicly display a work. *Id.* § 106.

19. *Id.* § 1201(b)(1)(A)–(C).

20. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64,556, 64,557 (Copyright Office Oct. 28, 2000) (No. RM 99-7D) (to be codified at 37 C.F.R. pt. 201), available at <http://www.copyright.gov/fedreg/2000/65fr64555.pdf>.

21. *Id.*

22. See 17 U.S.C. §§ 1203(c), 1204(a).

23. See S. REP. NO. 105-190, at 29 (1998).

24. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. at 64,557 (No. RM 99-7D).

25. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 67 Fed. Reg. 63,578, 63,579 (Copyright Office Oct. 15, 2002) (No. RM 2002-4) (to be codified at 37 C.F.R. pt. 201), available at <http://www.copyright.gov/fedreg/2002/67fr63578.pdf>.

26. *Id.*

circumventing user for infringement.²⁷ With respect to devices used for circumvention, however, § 1201 essentially makes no distinction between circumventing access- or rights-control measures by outlawing devices that do either.

B. DVD Region Coding System

In response to new problems that emerged as a result of the rapid advance of digital technology to record and distribute movies, major movie studios have resorted to various technological protection mechanisms, such as a content scrambling system (CSS), Macrovision, and CGMS/A.²⁸ The DVD region coding system, another such mechanism, was developed as an important tool to fight parallel imports of DVDs.²⁹ The system has two basic components: “the region code flag on a DVD and the region code check conducted by a licensed DVD player.”³⁰ To operate the region coding system, the movie industry divided the world into several regions.³¹ As a result, a consumer can access the copyrighted content on a DVD only when the DVD player detects that the DVD matches the region of the DVD player. For instance, if an American consumer purchases a DVD in Japan, which is in Region 2, she would not be able to play it in the Region 1 DVD player that she bought in the United States. Instead, she would need a Region 2 DVD player. In this sense, the only function of the region coding system

27. *Id.*

28. Comments, *supra* note 4, at 14 n.38. CSS, the technology used most often, is “an encryption-based system that requires the use of appropriately configured hardware such as a DVD player or a computer DVD drive to decrypt, unscramble and play back, but not copy, motion pictures on DVDs.” *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 308 (S.D.N.Y. 2000), *aff’d sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001). With CSS, consumers of DVDs are expected to access DVD films only on a CSS-compliant player that prevents the user from using such a device to copy the film. *See id.* Therefore, CSS is “an access control and copy prevention system for DVDs developed by the motion picture companies.” *Id.* Some DVDs also contain a technological protection measure called region code enhancement (RCE), which was designed specifically to prevent DVDs from playing on DVD players that have been modified to be region-code free and players that have been manufactured as multi-zone players. Comments, *supra* note 4, at 15.

29. DMCA REPORT, *supra* note 2, at 74 n.262.

30. Memorandum from Marybeth Peters, Register of Copyrights, to James H. Billington, Librarian of Cong. 121 (Oct. 27, 2003) [hereinafter Memorandum], available at <http://www.copyright.gov/1201/docs/registers-recommendation.pdf>.

31. Six geographic regions are defined: Region 1 (United States and Canada); Region 2 (Japan, Europe, South Africa, and the Middle East); Region 3 (Southeast Asia and East Asia); Region 4 (Australia, New Zealand, Pacific Islands, Mexico, Central and South America, and the Caribbean); Region 5 (Indian subcontinent, former Soviet Union, and Africa); and Region 6 (People’s Republic of China). *See* What Are “Regional Codes,” “Country Codes,” or “Zone Locks”?, <http://www.dvddemystified.com/dvdfaq.html#1.10> (last visited May 23, 2006). Region 7 is reserved, and Region 8 applies to movies viewed during international travel, such as on airplanes and cruise ships. *Id.*

is to control consumer access to copyrighted movies on DVDs; thus, it is an access-control technology.³²

Because the region coding system prevents people from playing foreign DVDs (i.e., DVDs coded for sale outside Region 1) on their Region 1 DVD players, some American consumers may elect to either modify their players or directly purchase multi-zone DVD players from online sellers in order to play foreign DVDs. Although there is no indication that copyright owners have made any efforts to stop the production or distribution of multi-zone DVD players, it is argued that such players violate the DMCA's anti-circumvention provisions.³³

C. Court Interpretations of the Anti-Circumvention Provisions

Because the region coding system limits access to movies in DVD format but provides no additional protection against copying, displaying, performing, or distributing the work, any potential cause of action against a manufacturer or distributor of multi-zone DVD players designed to circumvent the region coding system arguably would lie only under § 1201(a)(2). In *Universal City Studios, Inc. v. Reimerdes*, the first case to interpret § 1201(a)(2) in the context of DVD access-control technology, eight major motion picture studios that released movies both for distribution in theaters and on DVD sued, among others, a Web site operator for disseminating software called DeCSS.³⁴ Devised by a Norwegian teenager, DeCSS allowed users to break the CSS protection system, thus making it possible to access, copy, and distribute the contents of DVD movies without the copyright owner's permission.³⁵ The district court found that the plaintiff had made a prima facie case of a violation of the DMCA because DeCSS was obviously a "device" that was "designed primarily to circumvent" access controls under §1201(a)(2)(A).³⁶ The court then rejected a fair use defense based on § 1201(c) by finding that the activity at issue was an unauthorized access action rather than copyright infringement.³⁷ One year later, the Second Circuit affirmed *Reimerdes* in *Universal City Studios, Inc. v. Corley*.³⁸ Like the district court, the Second Circuit disagreed with defendants' fair use argument under § 1201(c).³⁹ Because the defendants were "trafficking in a decryption code that enables unauthorized access to

32. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64,556, 64,569 (Copyright Office Oct. 28, 2000) (No. RM 99-7D) (to be codified at 37 C.F.R. pt. 201), available at <http://www.copyright.gov/fedreg/2000/65fr64555.pdf>.

33. Memorandum, *supra* note 30, at 121 n.213.

34. See 111 F. Supp. 2d 294, 311 (S.D.N.Y. 2000), *aff'd sub nom.* *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

35. *Id.*

36. *Id.* at 318-19.

37. *Id.* at 321-24.

38. 273 F.3d 429, 444 (2d Cir. 2001).

39. *Id.* at 443.

copyrighted materials,” they could not claim to be making fair use of any copyrighted materials.⁴⁰ As the court noted, “[T]he DMCA targets the *circumvention* of digital walls guarding copyrighted material (and trafficking in circumvention tools), but does not concern itself with the *use* of those materials after circumvention has occurred.”⁴¹

The Federal Circuit first interpreted the anti-circumvention provisions of § 1201 in an appeal of *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, a case from the Northern District of Illinois.⁴² In the district court case, Chamberlain Group, a garage door opener (GDO) manufacturer, sued Skylink pursuant to § 1201 for producing a universal transmitter that allegedly circumvented Chamberlain’s copyrighted “rolling code” in its openers.⁴³ The rolling code was designed to reduce the likelihood of burglary by preventing the code from being intercepted by a thief who could later replay it to open the garage door.⁴⁴ Skylink manufactured and sold universal transmitters designed to interoperate with many different GDO models, including Chamberlain’s rolling code.⁴⁵ In granting Skylink’s motion for partial summary judgment on Chamberlain’s DMCA claim, the district court found that Chamberlain’s customers had “a reasonable expectation” that they could replace the original product with a universal transmitter because Chamberlain failed to warn its customers that they should avoid using non-Chamberlain-made devices.⁴⁶ The Federal Circuit affirmed the district court’s grant of summary judgment for Skylink after Chamberlain appealed.⁴⁷ The circuit court specifically denied Chamberlain’s § 1201(a)(2) claim because the DMCA “prohibits only forms of access that bear a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners,”⁴⁸ and Chamberlain failed to establish such a relationship.⁴⁹ As a result, *Chamberlain III* represents the first federal court decision expressly limiting the reach of § 1201(a)(2) to access-circumvention activities that also are infringing under the Copyright Act.⁵⁰

40. *Id.* at 459.

41. *Id.* at 443.

42. *Chamberlain III*, 381 F.3d 1178, 1185 (Fed. Cir. 2004). The Federal Circuit case concerned Chamberlain’s appeal of summary judgment entered in favor of Skylink. *Id.* at 1181; *see also* Chamberlain Group, Inc. v. Skylink Techs., Inc. (*Chamberlain II*), 292 F. Supp. 2d 1040 (N.D. Ill. 2003), *aff’d*, 381 F.3d 1178 (Fed. Cir. 2004). Chamberlain did not appeal an earlier denial of its own summary judgment motion. *Chamberlain III*, 381 F.3d at 1181–82; *see also* Chamberlain Group, Inc. v. Skylink Techs., Inc. (*Chamberlain I*), 292 F. Supp. 2d 1023 (N.D. Ill. 2003).

43. *Chamberlain II*, 292 F. Supp. 2d at 1041.

44. *Id.* at 1042.

45. *Id.*

46. *Id.* at 1045–46.

47. *Chamberlain III*, 381 F.3d at 1204.

48. *Id.* at 1202.

49. *Id.* at 1204. According to the Federal Circuit, “Chamberlain neither alleged copyright infringement nor explained how the access provided by [Skylink’s universal] transmitter facilitates the infringement of any right that the Copyright Act protects.” *Id.*

50. *Id.* at 1198–99.

Less than two months after *Chamberlain III*, another circuit court limited the application of § 1201.⁵¹ In *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, the Sixth Circuit reversed a district court decision granting Lexmark, a printer manufacturer, a preliminary injunction that prevented Static Control Components from manufacturing or distributing a microchip that enabled aftermarket toner cartridges to interoperate with Lexmark's printers.⁵² The district court had held that Lexmark's authentication sequence, occurring between a printer and microchips contained in toner cartridges, constituted a "technological measure" that "control[led] access" to a copyrighted work, i.e., the copyrighted Toner Loading Program and Printer Engine Program.⁵³ In determining whether Lexmark's DMCA claims prevailed on the merits, the district court found the plain meaning of § 1201 to be clear enough and, thus, found it unnecessary to consider the legislative history or policy of the DMCA: "Quite simply, if a work is entitled to protection under the Copyright Act, trafficking in a device that circumvents a technological measure that controls access to such work constitutes a violation under section 1201(a)."⁵⁴ Because Static Control Components manufactured the microchip with the primary purpose of circumventing Lexmark's authentication sequence, the district court found that Lexmark had a cause of action under § 1201(a)(2).⁵⁵

The Sixth Circuit, however, disagreed. Although the majority opinion limited its interpretation of § 1201(a)(2) to determining whether Lexmark's authentication sequence "effectively" controlled access to its Printer Engine Program,⁵⁶ both concurring opinions took an approach similar to that of the Federal Circuit in *Chamberlain III*. In rejecting Lexmark's interpretation of § 1201(a)(2), which would have imposed liability for any device used to circumvent a technological measure regardless of its purpose, Judge Merritt claimed that "[s]uch a reading would ignore the precise language . . . as well as the main point of the DMCA—to prohibit the pirating of copyright-protected works such as movies, music, and computer programs."⁵⁷ Therefore, "[u]nless a plaintiff can show that a defendant circumvented protective measures for such a purpose, its claim should not be allowed to go forward."⁵⁸ Judge Feikens also found that "[b]ecause Defendant's chip can *only* make non-

51. *Lexmark Int'l, Inc. v. Static Control Components, Inc. (Lexmark II)*, 387 F.3d 522 (6th Cir. 2004).

52. *Id.* at 529–30.

53. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 253 F. Supp. 2d 943, 967 (E.D. Ky. 2003), *vacated*, 387 F.3d 522 (6th Cir. 2004).

54. *Id.* at 969–70.

55. *Id.* at 968–69.

56. *Lexmark II*, 387 F.3d at 546–49.

57. *Id.* at 552 (Merritt, J., concurring).

58. *Id.*

infringing uses of the Lexmark Printer Engine Program, it is clear Congress did not intend the DMCA to apply in this situation.”⁵⁹

III. ANALYSIS

Federal courts thus are divided on how to interpret § 1201(a)(2). On the one hand, the Second Circuit and district judges in the Southern District of New York and the Eastern District of Kentucky have adopted a broad reading, which asserts that the device or means in question violates the DMCA anti-circumvention provisions if it meets any of the three prongs listed in § 1201(a)(2).⁶⁰ As the *Reimerdes* court noted, “Whether defendants did so in order to infringe, or to permit or encourage others to infringe, copyrighted works in violation of other provisions of the Copyright Act simply does not matter for purposes of Section 1201(a)(2).”⁶¹

To support its broad reading of §1201(a)(2), the *Reimerdes* court specifically distinguished *Sony Corp. of America v. Universal City Studios, Inc.*, by noting that as a contributory infringement action, *Sony* could not apply because “the DMCA fundamentally altered the landscape.”⁶² The issue in *Reimerdes* was whether the circumventing activity that enabled non-infringing use by permitting access to a copyrighted work mandated liability under § 1201(a)(2).⁶³ Answering in the affirmative, the court found that a technology or device may have “a substantial noninfringing use, and hence be immune from attack under *Sony*’s construction of the Copyright Act—but nonetheless still be subject to suppression under Section 1201.”⁶⁴ Because the legislative intent and the language of the statute are “crystal clear,” the court concluded, “courts may not undo what Congress so plainly has done by ‘construing’ the words of a statute to accomplish a result that Congress rejected.”⁶⁵ The Second Circuit affirmed this opinion.⁶⁶

Similarly, the *Lexmark I* court held that if Congress had intended to prohibit only access with an infringing purpose, § 1201(a)(2) would be

59. *Id.* at 564 (Feikens, J., concurring in part and dissenting in part).

60. *See, e.g.*, *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 319 (S.D.N.Y. 2000), *aff’d sub nom.* *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

61. *Id.*

62. *Id.* at 323. In *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the movie industry brought an action against Sony alleging that the use of Sony’s Betamax video cassette recorders (VCRs) to tape copyrighted programs violated § 106 of the Copyright Act and that the manufacture and sale of the machines themselves constituted contributory copyright infringement. Based on the finding that the VCR was capable of several non-infringing uses, including time-shifting of television broadcasts by home viewers, the Supreme Court held that contributory infringement liability could not reach the manufacturer of a device that is “capable of substantial noninfringing uses.” *Sony*, 464 U.S. at 422–23, 442.

63. *Reimerdes*, 111 F. Supp. 2d at 323.

64. *Id.* (citing *RealNetworks, Inc. v. Streambox, Inc.*, No. 2:99CV02070, 2000 WL 127311, at *8 (W.D. Wash. Jan. 18, 2000)).

65. *Id.* at 324.

66. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 460 (2d Cir. 2001).

redundant because “that goal was accomplished through section 1201(b).”⁶⁷ As the court noted, “The DMCA is clear that the right to protect against unauthorized access is a right separate and distinct from the right to protect against violations of exclusive copyrights such as reproduction and distribution.”⁶⁸ Therefore, § 1201(a)(2) bans manufacturing, distribution, or trafficking in devices that provide unauthorized access to a copyrighted work even if such devices do not facilitate copyright infringement, while § 1201(b)(1) prohibits trafficking in devices that circumvent a technological measure and cause a violation of copyright owners’ exclusive rights under § 106.⁶⁹

On the other hand, both the Federal Circuit and the Sixth Circuit have adopted a narrower reading that presents a dramatic development in judicial understanding of § 1201(a)(2). By defining more precisely the outer boundary of the DMCA, the two circuit courts doubted that a broad reading of the DMCA’s anti-circumvention provisions was a reasonable approach. Actually, while some courts repeatedly claimed that the statutory language was “unambiguous” and “clear,”⁷⁰ many copyright scholars have found the exact opposite is true.⁷¹ In view of the ambiguity of the statute, “[w]ithout the context that legislative history furnishes, the already impenetrable language of the Digital Millennium Copyright Act would become utterly unfathomable.”⁷² Although the *Chamberlain III* and *Lexmark II* cases both deal with aftermarket products, the reasoning of these two decisions presented by the Federal Circuit and the Sixth Circuit is insightful and applicable to the issue of multi-zone DVD players. Considering Congress’s primary purpose of curtailing the piracy of copyrighted works by enacting the DMCA,⁷³ both the *Chamberlain III* and the *Lexmark II* courts correctly rejected the plaintiffs’ broad interpretation of the provisions of § 1201.

A. Broad Readings of § 1201 Will Yield Absurd Results

In *Chamberlain III*, the Federal Circuit asserted that the DMCA’s anti-circumvention provisions did not convey additional property rights to the copyright owners.⁷⁴ Rather, the provisions created a new cause of action to which a copyright owner could resort in order to protect her rights under § 106.⁷⁵ As the court noted, “Like all property owners

67. *Lexmark I*, 253 F. Supp. 2d 943, 969 (E.D. Ky. 2003), *vacated*, 387 F.3d 522 (6th Cir. 2004).

68. *Id.*

69. *Id.*

70. *See, e.g., id.*; *Reimerdes*, 111 F. Supp. 2d at 324.

71. *See, e.g.*, David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA’s Commentary*, 23 CARDOZO L. REV. 909, 964 (2002); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 530–34 (1999).

72. Nimmer, *supra* note 71, at 964.

73. *See infra* Part III.B.

74. *Chamberlain III*, 381 F.3d 1178, 1192 (Fed. Cir. 2004).

75. *Id.* at 1193–94.

taking legitimate steps to protect their property, . . . copyright owners relying on the anticircumvention provisions remain bound by all other relevant bodies of law.”⁷⁶ If § 1201(a) allowed copyright owners to use technological measures to block all access to their copyrighted works, however, it would create two copyright regimes.⁷⁷ Consequently, while copyright owners are granted limited rights under § 106, they would “possess *unlimited* rights to hold circumventors liable under Section 1201(a) *merely for accessing that work*, even if that access enabled *only* rights that the Copyright Act grants to the public.”⁷⁸ In other words, such a result would be absurd.⁷⁹

Similarly, Judge Merritt’s concurring opinion in *Lexmark II* expressly rejected Lexmark’s broad interpretation of the statute that any device that intentionally circumvents a technological access control measure necessarily violates the DMCA regardless of the purpose of the circumvention.⁸⁰ The direct danger of Lexmark’s construction is that the DMCA would be abused as a legal weapon to eliminate competition.⁸¹ Recognizing “Congress’s aim merely to prevent piracy,” Merritt continued: “[A] better reading of the statute is that it requires plaintiffs as part of their burden of pleading and persuasion to show a purpose to pirate on the part of defendants.”⁸²

Moreover, as the Federal Circuit pointed out, a provision that prohibited access without regard to legitimate purposes behind such access would affect copyright owner’s rights and thus conflict with § 1201(c)(1),⁸³ which states that “[n]othing in this section shall affect rights, remedies, limitations or defenses to copyright infringement, including fair use, under this title.”⁸⁴ Therefore, courts have the obligation to adopt a focused rather than a broad construction of § 1201(a)(2). By interpreting the statute in the full context of the copyright law, the Federal Court held that § 1201(a)(2) prohibits only unauthorized access that “bear[s] a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners.”⁸⁵

76. *Id.* at 1194.

77. *Id.* at 1200.

78. *Id.* at 1200–01.

79. The court further stated that under Chamberlain’s reading, “disabling a burglar alarm to gain ‘access’ to a home containing copyrighted books, music, art, and periodicals would violate the DMCA; anyone who did so would unquestionably have ‘circumvent[ed] a technological measure that effectively controls access to a work protected under [the Copyright Act].’” *Id.* at 1201.

80. *Lexmark II*, 387 F.3d 522, 552 (6th Cir. 2004) (Merritt, J., concurring).

81. *Id.*

82. *Id.*

83. *Chamberlain III*, 381 F.3d at 1202.

84. 17 U.S.C. § 1201(c)(1) (2000).

85. *Chamberlain III*, 381 F.3d at 1202.

B. Legislative History Supports a Narrow Reading of § 1201(a)(2)

While Congress has the constitutionally enumerated power to grant copyright protection to original works,⁸⁶ it never has granted an unfettered monopoly to copyright owners. As the *Sony* court noted, “The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.”⁸⁷ To realize an appropriate equilibrium between the interests of copyright owners and the public, Congress has the responsibility to maintain the delicate balance of limited monopolies granted to copyright owners and public access to protected works.⁸⁸

With regard to the DMCA, Congress expected to advance two mutually supportive goals: (1) to promote the continued growth and development of electronic commerce; and (2) to protect intellectual property rights.⁸⁹ To reach such goals, the legislative history of the DMCA clearly demonstrates that Congress did not intend § 1201(a)(2) to apply to devices that merely facilitate legitimate use of copyrighted works. A report on the DMCA by the House of Representatives Committee on Commerce (“House Commerce Report”) explicitly states that § 1201(a)(2) “is not aimed at products that are capable of commercially significant noninfringing uses, such as consumer electronics . . . used by businesses and consumers for perfectly legitimate purposes.”⁹⁰ Similarly, the report of the Senate Committee on the Judiciary (“Senate Judiciary Report”) also clearly recognizes that the purpose of § 1201 is merely to “improve the ability of copyright owners to prevent the theft of their works” by allowing the application of technological protection measures.⁹¹

Unfortunately, although only certain technologies that meet at least one condition under § 1201(a)(2) would be prohibited, courts may abuse their discretion when determining whether a certain technology falls within that scope. For instance, the *Reimerdes* court stated that the DMCA was intended to prohibit “‘any technology,’ not simply black boxes.”⁹² This claim directly conflicts with Congress’s intentions. Both the Senate Judiciary and House Commerce Reports note that, in order to protect copyright owners as well as promote technological development,

86. The Copyright Clause of the U.S. Constitution grants Congress 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.” U.S. CONST. art. I, § 8, cl. 8.

87. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

88. *Id.*

89. H.R. REP. NO. 105-551, pt. 2, at 23 (1998).

90. *Id.* at 38.

91. S. REP. NO. 105-190, at 15 (1998).

92. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 317 n.135 (S.D.N.Y. 2000), *aff’d sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

§ 1201(a)(2) was drafted specifically to target “black boxes.”⁹³ As the House Commerce Report further notes, “It would be ironic if the great popularization of access to information, which is the promise of the electronic age, [would] be short-changed by legislation that purports to promote this promise, but in reality puts a monopoly stranglehold on information.”⁹⁴ Outlawing any circumvention of access controls regardless of its purpose would stretch copyright owners’ rights to such an extreme that it would undo the delicate balance that Congress has tried to maintain. Therefore, a narrow reading of the DMCA would more appropriately protect the interests of both content creators and information users. As a result, the *Chamberlain III* and *Lexmark II* cases provide a creative way to establish a balance between the interests of copyright owners and information users—that is, on the one hand, promoting progress in science and useful arts and, on the other hand, combating piracy and stimulating the creation and distribution of creative digital content.

C. Using Multi-Zone DVD Players Does Not Constitute an Infringing Activity

With the narrow construction of § 1201(a)(2) in mind, it is important to distinguish between devices that merely allow users to access copyrighted content and devices that permit users to copy, modify, or commit other infringing conduct. By requiring a nexus between infringement and the circumvention of access controls for liability under § 1201(a)(2), both *Chamberlain III* and *Lexmark II* presented an opportunity for circuit courts to articulate this distinction and consider its implication on the interpretation of § 1201.⁹⁵ Accordingly, because multi-zone DVD players only allow users to watch DVDs but not to copy or transmit copyrighted content, manufacturers and sellers of multi-zone DVD players would have a strong argument that the production and marketing of multi-zone DVD players do not violate § 1201(a)(2). Using such devices to play legitimately obtained DVDs would not allow consumers to violate any of the copyright owner’s exclusive rights under 17 U.S.C. § 106,⁹⁶ even though multi-zone DVD players are manufactured with the primary purpose of circumventing the region coding system.

93. S. REP. NO. 105-190, at 29; H.R. REP. NO. 105-551, pt. 2, at 38.

94. H.R. REP. NO. 105-551, pt. 2, at 26 (quoting a letter to the Committee from the Consumers Union).

95. For instance, the Federal Circuit specifically distinguished three district court decisions relied on by Chamberlain on the ground that, in each case, the circumventing technology allowed people to make infringing use of the copyrighted work. *Chamberlain III*, 381 F.3d 1178, 1198–99 (Fed. Cir. 2004).

96. See Comments, *supra* note 4, at 19. The Register of Copyrights also found that it is uncontested between copyright owners and the public that merely watching a lawfully obtained copy of a foreign DVD in private is a non-infringing use. Memorandum, *supra* note 30, at 121.

To establish liability under the DMCA for circumvention, a number of movie studios have claimed that the mere purchase of DVDs does not necessarily grant authorization for unlimited access to the copyrighted content.⁹⁷ Therefore, when a consumer purchases a CSS-protected DVD, “authorization by the Studios has been limited to accessing DVD content via authorized equipment,” such as a DVD Copy Control Association-compliant player.⁹⁸ In other words, according to the studios, playing a region-coded DVD on a multi-zone player would exceed the authorization of the copyright owner and constitute circumvention under § 1201(a)(1). Such an assertion is without merit. In its report on the DMCA, the House of Representatives Committee on the Judiciary characterized circumventing an access-control measure as “the electronic equivalent of breaking into a locked room in order to obtain a copy of a book.”⁹⁹ The Senate likewise analogized the prohibition of trafficking in anti-circumvention technology to “making it illegal to break into a house using a tool, the primary purpose of which is to break into houses.”¹⁰⁰ Such metaphors used by Congress to support its anti-piracy rhetoric, however, cannot apply in the case of multi-zone DVD players. By legally purchasing a region-coded DVD, the customer has ownership of the DVD—the “room” or the “house.” He has every right to either break into the “room” or “house” or even destroy it completely. In a partially concurring opinion in *Lexmark II*, Judge Feikens noted that the customer’s purchase of a Lexmark printer entitles him to use the Printer Engine Program because the printer cannot work without that program.¹⁰¹ Consequently, any circumvention of the authentication sequence to gain access to the Printer Engine Program is authorized, at least implicitly, by Lexmark.¹⁰² While the Printer Engine Program is not identical with the region coding system, such analysis based on the first sale doctrine¹⁰³ is illuminating. By selling region-coded DVDs to consumers, the copyright owner is giving the legitimate purchaser permission to use the physical object containing copyrighted material for his personal purpose in a non-infringing way. The copyright owner has no control over the subsequent use or disposition of that physical object. Only if the purchaser makes copies for further distribution or conducts unauthorized public performances will he be implicated for copyright infringement.

97. See Reply Brief for Plaintiffs-Appellees at 63 n.43, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (No. 00-9185), 2001 WL 34108902.

98. *Id.* The DVD Copy Control Association licenses CSS to DVD equipment manufacturers. DVD Copy Control Association, Frequently Asked Questions, <http://www.dvdcca.org/faq.html> (last visited May 23, 2006).

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

100. S. REP. NO. 105-190, at 11 (1998).

101. *Lexmark II*, 387 F.3d 522, 563–64 (6th Cir. 2004) (Feikens, J., concurring in part and dissenting in part).

102. *Id.* at 564.

103. See 17 U.S.C. § 109(a); *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 349–50 (1908).

D. Prohibiting Multi-Zone DVD Players Impedes Consumers' Legal Rights

Having ongoing control over how consumers subsequently watch their legally acquired DVDs through the region coding system may also raise the concern that copyright owners have been “obtaining too much power and becoming unduly repressive.”¹⁰⁴ Borrowing Congress’s house-breaking metaphor, endorsing the region coding system equals allowing book publishers to require purchasers to read books only with specific lamps provided by certain producers. Because most motion picture DVDs, if not all, are region-coded and can only be accessed on devices authorized and licensed by the copyright owners, major studios can control both the device producers and the viewers. Consequently, copyright owners have “an unprecedented amount of control over which devices enter the market, how much DVDs and players cost, what functions and features are forbidden to include on a DVD player, and where and how users watch their motion pictures.”¹⁰⁵

An often-cited justification for the DVD region coding system is that such an access-control measure would allow the public to watch films on DVD even though the films are still playing in theaters in other regions.¹⁰⁶ As one content producer has noted, “If copyright owners are unable to rely on regional coding to control the release of their content to accommodate these concerns, it will adversely impact legitimate and long standing business models and may restrict the availability of content in the various distribution channels and markets.”¹⁰⁷ Absent the region coding system, movies in DVD format would not be available for American consumers to purchase until “a film completes its entire global theatrical run.”¹⁰⁸ However, unlike CSS, which was designed to protect the copyrighted content on DVDs from being illegally copied, the region coding system does not have a rights-control function.¹⁰⁹ Rather, the region coding system’s main purpose is commercial: by preventing consumers from simply purchasing DVDs released in other countries, movie studios can dictate release schedules and, accordingly, set different retail prices in different markets to extract the maximum possible price from consumers. Such business interest has nothing to do with the

104. Calaba, *supra* note 5, at 10.

105. Comments of IP Justice at 5, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62,011 (Copyright Office Oct. 28, 2003) (No. RM 2002-4), available at <http://www.copyright.gov/1201/2003/comments/020.pdf>.

106. DVD Copyright Control Association, *supra* note 98.

107. Reply Comments of AOL Time Warner Inc. at 10, Exemption to Prohibition on Circumvention of Copyright Protection Systems of Access Control Technologies, 68 Fed. Reg. 62,011 (No. RM 2002-4), available at <http://www.copyright.gov/1201/2003/reply/019.pdf>.

108. DVD Copyright Control Association, *supra* note 98.

109. See Comments, *supra* note 4, at 15.

protection of movie studios' copyrights and should not be regulated by the DMCA.¹¹⁰

In addition, by prohibiting multi-zone DVD players, the DMCA prevents American consumers from meaningfully exercising their right to import foreign DVDs, which often are cheaper than those available domestically. While current copyright law grants owners the exclusive right to distribute copies of their works to the public, "[t]here is nothing in the copyright law that permits an author to prevent a legitimate purchaser of her work from using it in another country."¹¹¹ Restrictions on the unauthorized importation of copyrighted works exempt importation of single copies for private use.¹¹² Thus, it is entirely lawful for consumers to import single copies of foreign movies for personal, non-commercial uses.¹¹³ In certain circumstances, the first sale doctrine may further limit a copyright owner's ability to restrict imports of DVDs coded for sale outside Region 1. While the Supreme Court has acknowledged that the first sale doctrine applies to the importation right found in § 602(a) of the Copyright Act,¹¹⁴ its application may be limited to situations in which the copyrighted goods were made in the United States, shipped abroad, and then imported back into the United States.¹¹⁵ Because most foreign DVDs are produced under the laws of foreign countries, however, the extent of the first sale doctrine's application to the importation of isolated copies of foreign movies is unclear and will be a fact-specific determination.

By contrast, without an appropriate device for playback, consumers' choice of product is restricted. If the foreign movie is not released in the United States, a consumer either cannot watch such a movie or must purchase DVD players from each of the relevant foreign regions from which she has purchased DVDs.¹¹⁶ Even if the DVD has been released in Region 1, it is likely that American consumers will need to buy a product locally with different features from the one originally released overseas. Such an undue interference of the exercise of consumer rights is getting

110. The legislative history has shown that Congress based its power to enact the DMCA on the Copyright Clause. According to the House Commerce report, "Article 1, Section 8, Clause 8 of the United States Constitution authorizes the Congress to promulgate laws governing the scope of proprietary rights in, and use privileges with respect to, intangible 'works of authorship.'" H.R. REP. NO. 105-551, pt. 2, at 24 (1998).

111. Stephen M. Kramarsky, *Copyright Enforcement in the Internet Age: The Law and Technology of Digital Rights Management*, 11 DEPAUL-LCA J. ART & ENT. L & POL'Y 1, 12 (2001).

112. 17 U.S.C. § 602(a)(2) (2000).

113. *Id.*

114. *Quality King Distrib. Inc. v. L'Anza Research Int'l, Inc.*, 523 U.S. 135, 146-47 (1998).

115. *Id.* at 154 (Ginsburg, J., concurring).

116. The region code on a computer DVD drive may be reset by the consumer up to five times. To get more resets (up to 20), the consumer must take the computer to a service center authorized by the manufacturer of the device—the precondition being that there is such a service, which would be very inconvenient and cost her money as well. Letter from Bruce H. Turnbull, Attorney for DVD Copy Control Ass'n, to David O. Carson, Gen. Counsel, U.S. Copyright Office 4-5 (Aug. 5, 2003), available at <http://www.copyright.gov/1201/2003/post-hearing/post24.pdf>. The DVD CSS license does not allow region codes for DVD players to be reset once the players are sold to consumers. *Id.* at 4.

even more serious in the age of globalization as more consumers buy DVDs from different countries where they frequently visit or work.¹¹⁷

IV. RECOMMENDATION

While the legislative history of the DMCA clearly indicates that Congress intended to ensure that the public would continue to enjoy a wide range of non-infringing uses of copyrighted works, the plain language of the DMCA may appear to “cast a far wider net.”¹¹⁸ Without expressly requiring an inquiry into whether the circumvention is for a non-infringing purpose, § 1201(a)(2) may have the consequence of chilling previously legal behaviors by imposing liability for circumvention.¹¹⁹ The statute also creates a possibility for “strike suits” by anxious or opportunistic copyright owners challenging the development of new technologies that may have circumventing capability.¹²⁰ The *Chamberlain* and *Lexmark* cases present examples of such suits. More important, the ambiguous and overbroad language already has resulted in different interpretations of the DMCA among different federal courts.¹²¹

Therefore, to effectuate the congressional intent of allowing non-infringing circumvention, the first step should be resolving the ambiguities and overextensions of the DMCA because “the public interest and the evolution of the marketplace often are better served by laws that clearly address and define the rules for a new technological environment.”¹²² In January 2003, Representatives Rick Boucher, John Doolittle, and Spencer Bachus introduced the Digital Media Consumers’ Rights Act of 2003 (DMCRA) to amend the DMCA by allowing the circumvention of a technological protection measure for a non-infringing purpose.¹²³ Specifically, § 5(b)(2) of the DMCRA would relax the anti-trafficking provisions of § 1201(a)(2) by adding an exemption provision to § 1201(c) to provide that it is not a violation of § 1201(a)(2) “to

117. For instance, in the course of the Copyright Office’s 2003 exemptions rulemaking, the lion’s share of comments received supported exempting DVD owners from § 1201(a)(1)(A) when they use circumventing devices to watch non-Region 1 DVDs. See Memorandum, *supra* note 30, at 122.

118. Thomas M. Morrow & Jeffrey D. Sullivan, *Lexmark v. Static Control: Another Circuit Court Reads Limitations into DMCA’s Sweeping Statutory Anti-Circumvention Strictures*, 69 PAT. TRADEMARK & COPYRIGHT J. 49, 50 (2004), available at <http://www.bakerbotts.com/fewsite/otherfiles/MorrowSullivanArticleDMCA.pdf>.

119. Michael Landau, *The DMCA’s Chilling Effect on Encryption Research*, GIGALAW.COM, Sept. 2001, <http://www.gigalaw.com/articles/2001-all/landau-2001-09-all.html>.

120. Samuelson, *supra* note 71, at 556.

121. While the *Chamberlain III* court claimed that its ruling offered the “only meaningful reading” of § 1201, it acknowledged that “such a rule of reason may create some uncertainty and consume judicial resources.” *Chamberlain III*, 381 F.3d 1178, 1202-03 (Fed. Cir. 2004).

122. Comments of the Digital Media Ass’n at 4, Report to Congress Pursuant to Section 104 of the Digital Millennium Copyright Act, 65 Fed. Reg. 63,626 (Copyright Office Oct. 24, 2000) (No. 000522150-0150-02), available at <http://www.copyright.gov/reports/studies/dmca/comments/Init021.pdf>.

123. Digital Media Consumers’ Rights Act of 2003, H.R. 107, 108th Cong. § 5(b) (2003), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h107ih.txt.pdf.

manufacture, distribute, or make noninfringing use of a hardware or software product capable of enabling significant noninfringing use of a copyrighted work.”¹²⁴ According to Representative Boucher, such an amendment aims to restore the *Sony* standard by ensuring consumers have access to devices that can facilitate the circumvention of technological measures for legitimate purposes.¹²⁵

While this bill was applauded as an “important first step in restriking a balance in copyright law,”¹²⁶ it nonetheless was criticized for creating a legal loophole for third-party infringers.¹²⁷ While it permits non-infringing use of a device to thwart protection, the bill may lead to infringing use by others without the knowledge or intent of the non-infringing user: “In effect, this amendment severs the liability of the person who initially broke the copyright protection, thereby crippling the technological efforts to protect the copyrighted works.”¹²⁸ Although these criticisms are highly questionable, the DMCPA barely received any support in Congress. The DMCPA was referred to a subcommittee in May 2004,¹²⁹ and it has languished there ever since.

Rather than overextending exemptions, as the DMCPA attempted to do, a mild reform of § 1201(a)(2) would be more practicable. To be sure, in the DMCA, Congress provided a mechanism to address the issue of the statute’s overbreadth. According to § 1201(a)(1)(C), every three years, the Register of Copyrights must conduct a rulemaking proceeding to determine whether § 1201(a)(1)(A) adversely affects users in their ability to make non-infringing use of a particular class of works.¹³⁰ The House Commerce Report states that by monitoring “developments in

124. *Id.* § 5(b)(2).

125. Digital Media Consumers’ Rights Act Section-by-Section Description, http://www.boucher.house.gov/index.php?option=com_content&task=view&id=23&Itemid= (last visited May 23, 2006).

126. *The Digital Media Consumers’ Rights Act of 2003: Hearing on H.R. 107 Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. 20 (2004) [hereinafter *DMCPA Hearings*] (statement of Lawrence Lessig, Professor, Stanford Law School).

127. See e.g., Michael Einhorn, *Digitization and Its Discontents: Digital Rights Management, Access Protection, and Free Markets*, 51 J. COPYRIGHT SOC’Y U.S.A. 279, 312 (2004); Jacob Weiss, Note and Comment, *Harmonizing Fair Use and Self-Help Copyright Protection of Digital Music*, 30 RUTGERS COMPUTER & TECH. L.J. 203, 225 (2004).

128. Weiss, *supra* note 127, at 225. Professor Lessig also acknowledged that this amendment could create a problem in the future. *DMCPA Hearings, supra* note 126, at 21 (statement of Lawrence Lessig, Professor, Stanford Law School).

129. On May 12, 2004, the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce of the U.S. House of Representatives held a hearing on the DMCPA. The full hearing, including the witnesses’ prepared testimony and an archived Web cast, is available online. Hearing on H.R. 107, *The Digital Media Consumers’ Rights Act of 2003*, <http://energycommerce.house.gov/108/Hearings/05122004hearing1265/hearing.htm> (last visited May 23, 2006).

130. 17 U.S.C. § 1201(a)(1)(C) (2000). If the Register of Copyrights determines that the users of a particular class of works are or are likely to be adversely affected, the Librarian of Congress may, based on the recommendation of the Register of Copyrights, exempt that class of works from the prohibition against circumvention of technological measures that control access to copyrighted works for a three-year period. *Id.*

the marketplace for copyrighted materials,” such a “fail-safe” mechanism would “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.”¹³¹

However, this mechanism applies only to circumvention of technological measures that control access to copyrighted works, which is expressly prohibited under § 1201(a)(1)(A).¹³² In other words, the Librarian of Congress does not have the authority to exempt any circumvention devices banned under either §§ 1201(a)(2) or 1201(b)¹³³; Congress has reserved to itself the authority to amend those sections. Such a construction of the exemption power is problematic. As Congress had recognized, §§ 1201(a)(1) and 1201(a)(2) are closely interrelated.¹³⁴ Therefore, to provide “meaningful protection and enforcement of the copyright owner’s right,” § 1201(a)(2) supplements § 1201(a)(1) “with prohibitions on creating and making available certain technologies, products and services used, developed or advertised to defeat technological protections against unauthorized access to a work.”¹³⁵ Without the complementary exemption to the trafficking ban under § 1201(a)(2), even if a proposed class is accepted as exemptible under § 1201(a)(1), such an exemption is moot and meaningless because consumers can only realize the interest granted by the exemption through self-help without any necessary technical assistance from other people.¹³⁶ As a result, “the only users whose interests are truly safeguarded are those few who personally possess sufficient expertise to counteract whatever technological measures are placed in their path.”¹³⁷

Moreover, the reasoning behind establishing the triennial review supports expanding the application of such a practice to § 1201(a)(2). When Congress established this “fail-safe” mechanism, it was concerned that marketplace realities could result in decreased access to copyrighted materials.¹³⁸ Such a result may come from “the permanent encryption of all electronic copies” or “the adoption of business models that depend

131. H.R. REP. NO. 105-551, pt. 2, at 36 (1998).

132. 17 U.S.C. § 1201(a)(1)(A). Section 1201(a)(1)(E) specifically provides that no exemption or determination made by the Copyright Office may be used as a defense in any action to enforce any provision other than § 1201(a)(1). *Id.* § 1201(a)(1)(E).

133. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 67 Fed. Reg. 63,578, 63,579 (Copyright Office Oct. 15, 2002) (No. RM 2002-4) (to be codified at 37 C.F.R. pt. 201), available at <http://www.copyright.gov/fedreg/2002/67fr63578.pdf>.

134. See S. REP. NO. 105-190, at 28 (1998).

135. *Id.*

136. See generally James L. Davis, Note, *Is Interoperability Just for Those Who Can Hack It? The Application of the DMCA Interoperability Exceptions in the Consumer Electronics Industry*, 2005 U. ILL. J.L. TECH. & POL’Y 141 (recognizing this problem and recommending that courts interpret the DMCA’s interoperability exceptions to permit lawful owners of protected works to obtain technical assistance from others).

137. David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 739–40 (2000) (footnote omitted).

138. H.R. REP. NO. 105-551, pt. 2, at 36 (1998).

upon restricting distribution and availability.”¹³⁹ The House Commerce Report elaborated: “In this scenario, it could be 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 for lawful purposes is not unjustifiably diminished.”¹⁴⁰ As mentioned above, the region coding system is such a business model adopted by the entertainment industry to control the global distribution of motion picture DVDs. As VHS tapes increasingly are phased out in favor of DVDs, fewer foreign movies will be accessible for U.S. consumers if they are prohibited from using multi-zone DVD players. To view a DVD coded for sale outside Region 1, American consumers without multi-zone DVD players may need to purchase a DVD player from that region.¹⁴¹ Such extra expenditure still might not be enough. Due to two incompatible television systems—PAL/SECAM and NTSC—even if an American consumer buys a DVD player capable of playing DVDs coded for sale outside Region 1, in order to view those movies on a U.S. television the consumer still may need a signal converter if his television cannot support the PAL/SECAM standard. An electricity voltage converter also may be needed if the DVD player does not work with U.S. power voltage.¹⁴²

Considering these potential adverse effects of prohibiting multi-zone DVD players on non-infringing private viewing, Congress should consider crafting a safety valve similar to the triennial exemption review to monitor the effect of the anti-trafficking provisions of §§ 1201(a)(2) and 1201(b) on manufacturing, importing, and providing devices that enable non-infringing uses of copyrighted works in the context of the DVD region coding system.¹⁴³ This solution would allow the Copyright Office to conduct public hearings every three years to examine the adverse effects of prohibiting multi-zone DVD players in the current

139. *Id.*

140. *Id.*

141. *See supra* note 116 and accompanying text.

142. Comments, *supra* note 4, at 22.

143. Since the enactment of the DMCA in 1998, the Librarian of Congress has made two rulemakings and exempted six classes of works. *See* James H. Billington, Librarian of Congress, Statement of the Librarian of Congress Relating to Section 1201 Rulemaking (Oct. 28, 2003), *available at* http://www.copyright.gov/1201/docs/librarian_statement_01.html. However, both rulemakings failed to exempt DVD owners from liability under § 1201(a)(1)(A) when they play DVDs on multi-zone DVD players privately, even if they do not infringe any exclusive right of the copyright owner. *Id.* Although the Copyright Office received more comments on this proposed exemption than any other, in its second rulemaking the Copyright Office held that because there are a number of ways to view foreign DVDs in the United States, there is no need to grant such an exemption. *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62,011, 62,016 (Copyright Office Oct. 28, 2003) (No. RM 2002-4) (to be codified at 37 C.F.R. pt. 201), *available at* <http://www.copyright.gov/fedreg/2003/68fr2011.pdf>. Such a ruling is problematic because it ignores other issues raised by a region coding system, such as violations of the first sale rule and undue restrictions on a consumer's legal use of her own property. As a result, without meaningful exemptions to § 1201(a)(2) of the DMCA, the limited monopoly over use of and access to copyrighted works granted by copyright law to copyright owners would be transformed into absolute control.

marketplace and in the next three-year period. Based on such hearings, the Copyright Office may recommend narrowly but reasonably defined exemptions to § 1201 liability for devices that can be used only to play foreign DVDs. Granting such an exemption, which would permit circumvention through the use of multi-zone DVD players to display legally owned foreign DVDs, would not impair the copyright owners' other technological efforts to prevent infringement.

V. CONCLUSION

The DMCA extends copyright protection from the infringing act to the act of gaining illegal access to the protected work. However, both *Chamberlain III* and *Lexmark II* confined such extension to the scope of unauthorized access with infringing purpose. As the Federal Circuit claimed in *Chamberlain III*, the DMCA, *inter alia*, created a federal cause of action only against those who circumvent technological measures that control access to a copyrighted work or manufacture and offer to the public any technology that is primarily designed for the purpose of circumventing a technological measure that effectively protects a right of a copyright holder.¹⁴⁴ Such interpretation not only creates a better balance of interests between copyright owners and the public, but also prevents content providers from misusing their limited monopoly granted under the Copyright Act. However, because the DMCA literally bars any devices or means that circumvent access-control technologies and Congress failed to include in the text of the legislation itself any language implementing its intent to allow non-infringing circumvention, it is questionable whether other federal circuit courts will choose to follow *Chamberlain III* and *Lexmark II*. Thus, it is necessary for Congress to craft an exemption to and review procedure for the DMCA ban on trafficking circumventing devices that permit individuals to bypass the region coding system on their DVDs in order to engage in lawful use of their personal property.

144. 17 U.S.C. § 1201(a)(2), (b)(1) (2000).