

# THE GARAGE DOOR OPENER CASE: OPENING THE DOOR TO CROSS PLATFORM FUNCTIONALITY IN THE WORLD OF DIGITAL MUSIC

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## INTRODUCTION

Copyright law embodies the delicate “balance between the interests of authors [in controlling the exploitation of their works] on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand.”<sup>1</sup> As technologies change, so do the laws that preserve the compromise copyright seeks to serve.<sup>2</sup> Today, complete digital copies of copyrighted works can be widely distributed with minimal time and effort.<sup>3</sup> To combat the growing problem of piracy and other infringement that naturally follows new channels of distribution, copyright owners seek to protect their works by implementing technological measures that control access to their works and protect against infringement.<sup>4</sup> These measures have, at times, been circumvented by users—without regard to the wishes of the copyright owner—to enable

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<sup>1</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

<sup>2</sup> In early eighteenth century England, the invention of the printing press spurred the promulgation of the Statute of Anne. *See* Statute of Anne, 1710, 8 Ann., c. 19 (Eng.). Years after the enactment of the Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075, Congress passed the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended primarily in scattered sections of 17 U.S.C.), to modernize the 1909 act and accommodate the changes in technology. ROGER E. SCHECHTER & JOHN R. THOMAS, *INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS* § 2.2.5 (2003). This happened again in 1998 with the passage of the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified primarily in scattered sections of 17 U.S.C.), which was designed to protect copyrights in the digital world. S. REP. NO. 105-190, at 1, 12 (1998).

<sup>3</sup> *See* 144 CONG. REC. H7074, H7091–92 (1998) (daily ed. Aug. 4, 1998) (statement of Rep. Coble).

<sup>4</sup> *See* JESSICA LITMAN, *DIGITAL COPYRIGHT* 29–31 (2001).

unfettered use, sometimes fair and other times foul.<sup>5</sup> Realizing these new challenges, Congress passed the Digital Millennium Copyright Act<sup>6</sup> (DMCA) to deal with copyright protection in the digital age.<sup>7</sup> The anti-circumvention provisions in the Act, which are located at § 1201(a), are aimed at prohibiting both the use and trafficking of devices that bypass any technological measure employed by a copyright owner that protects access to their work or a right afforded to them under the Copyright Act.<sup>8</sup>

In *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*,<sup>9</sup> the Federal Circuit became only the second appellate court<sup>10</sup> to interpret the reach of § 1201(a)(2).<sup>11</sup> Chamberlain Group, Inc. (Chamberlain), manufactured a line of garage door openers, known as the “Security+” product line, which contain an added security device featuring “rolling code” technology.<sup>12</sup> This technological measure is intended to prevent unauthorized opening of the garage door by other devices.<sup>13</sup> For example, the rolling code would prevent a criminal from programming a traditional universal remote to open a garage door for the purpose of breaking into the home.<sup>14</sup> Essentially, the rolling code authentication process protects access to the copyrighted program that operates the garage door unit.<sup>15</sup> Skylink Technologies, Inc. (Skylink) manufactured universal remote controls for garage door opener systems.<sup>16</sup> Skylink developed a method that bypassed the rolling code technology and offered a remote that could operate the “Security+” garage door opener system.<sup>17</sup> Chamberlain brought a claim

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<sup>5</sup> See 144 CONG. REC. H7074, H7092 (statement of Rep. Frank).

<sup>6</sup> Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified primarily in scattered sections of 17 U.S.C.).

<sup>7</sup> See 144 CONG. REC. H7074, H7093–94 (statement of Rep. Bliley).

<sup>8</sup> See 17 U.S.C. § 1201(a) (2000); see also S. REP. NO. 105-190, at 12 (1998).

<sup>9</sup> 381 F.3d 1178 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 923 (2005).

<sup>10</sup> In *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001), the Second Circuit was the first appellate court to interpret § 1201(a)(2). Just two months after the *Chamberlain* decision, the Sixth Circuit became the third appellate court to consider a § 1201(a)(2) claim in *Lexmark International, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004).

<sup>11</sup> See *Chamberlain*, 381 F.3d 1178.

<sup>12</sup> *Id.* at 1183.

<sup>13</sup> See *id.*

<sup>14</sup> See *id.*

<sup>15</sup> See *id.* at 1183–84.

<sup>16</sup> *Id.* at 1184.

<sup>17</sup> *Id.*

against Skylink under the DMCA because the circumvention accessed its copyrighted program.<sup>18</sup>

The central issue before the court was whether Skylink's universal remote violated the DMCA's anti-circumvention provisions by operating the Chamberlain "Security+" garage door opener system.<sup>19</sup> In sum, the Federal Circuit held that Skylink's universal remote did not violate the DMCA's anti-circumvention provisions because Chamberlain failed to show (1) a lack of authorization, an essential element of a § 1201(a) claim, and (2) a reasonable connection between access and protection, meaning there was no nexus between the circumvention and an infringement of a protected right.<sup>20</sup> This decision is important because it represents a significant change in interpretation, whereby the court limited the character and reach of the DMCA's anti-circumvention provisions.<sup>21</sup> The court concluded that § 1201 provides a theory of liability as opposed to a property right, where only the latter is capable of supporting a cause of action independent from an infringement claim under the Copyright Act.<sup>22</sup> Furthermore, the court limited the reach of the provision by supplanting a nexus requirement that must be satisfied by showing a reasonable relationship between the circumvention and infringement.<sup>23</sup> These principles limit both how and when the provisions may be used.

The DMCA provisions at issue must be extended no further than necessary to protect copyright interests and allow for legitimate public access. The *Chamberlain* decision looked beyond a plain reading of § 1201 to save the DMCA from producing precarious results while preserving the essential balance between copyright ownership and public access. The court's holding will, among other things, affect manufacturers of aftermarket products, like Skylink, and the world of digital media. This Note will examine how the ruling will affect trends in digital music, particularly the availability of § 1201(a)(2) as a tool to restrict the use of downloaded music files and how that will in turn influence the struggle for platform in the digital music market.

In order to fully understand the development of this controversy, Part I of this Note will first examine the statutory development of copyright law, followed by the protections and rights current law affords both owners and

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<sup>18</sup> *Id.* at 1182–84.

<sup>19</sup> *Id.* at 1184–85, 1190–91.

<sup>20</sup> *Id.* at 1203–04.

<sup>21</sup> See discussion *infra* Part III.

<sup>22</sup> *Chamberlain*, 381 F.3d at 1203–04.

<sup>23</sup> See *id.*

the public. Continuing with the statutory background, Part I will also discuss the enactment of the DMCA and its anti-circumvention provisions. Next, this Note will detail several cases that predate the *Chamberlain* decision, all of which provide contrary results. Part II will discuss the facts of the case, its procedural posture, and the issues decided by the court. Part III will provide an analysis of the opinion and the consequences that will inevitably follow. Finally, Part IV will conclude with the significance of the *Chamberlain* decision as it relates to digital media, particularly digital music. This section will demonstrate the implications of the decision in the context of digital music.

## I. BACKGROUND

On its most fundamental level, copyright law seeks to protect original works of authorship in the furtherance of “Science and useful Arts.”<sup>24</sup> Just as the scope of protected works has grown,<sup>25</sup> so too have the myriad of laws and conventions that govern copyrights.<sup>26</sup> Two major events have shaped the contours of copyright law: the invention of the printing press and the development of the Internet.<sup>27</sup> The following discussion leading up to the DMCA is by no means a complete historical review, but rather a snapshot meant to impress upon the reader a general understanding of the extent of protection afforded to creators, and the evolution of how those rights have been allocated between such owners and the public.

### A. Statutory Development of Copyright Law

Before the printing press, very few laws regulated the reproduction of works.<sup>28</sup> The printing press’s capacity for mass production of text necessitated the regulation to protect that text, which led to copyright protection.<sup>29</sup> The earliest system of copyright regulation began in sixteenth century England with the Stationers’ Company.<sup>30</sup> This group of artisans

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<sup>24</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>25</sup> Read literally, the constitutional mandate seems to protect tangible writings. *Id.* However, the courts have construed writings to encompass a broad scope of expressions. See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.03[A], at 2-28 n.3 (2005).

<sup>26</sup> See sources cited *supra* note 2.

<sup>27</sup> See PAUL GOLDSTEIN, COPYRIGHT’S HIGHWAY 27–28 (1994); see also LITMAN, *supra* note 4, at 35–38.

<sup>28</sup> See GOLDSTEIN, *supra* note 27, at 27.

<sup>29</sup> See SCHECHTER & THOMAS, *supra* note 2, § 2.2.1.

<sup>30</sup> See Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the* (continued)

assigned amongst themselves the right to publish specific manuscripts.<sup>31</sup> The increasing availability of the printing press, however, spurred competition, which threatened the Stationers' control and led to the first government intervention requiring all works to be published with a Stationers' copyright.<sup>32</sup>

The most significant law in the history of copyright would be enacted in 1710.<sup>33</sup> The Statute of Anne switched the focus from the publisher to the author by granting the author exclusive rights in the work for a fourteen-year period, which began on the date of first publication.<sup>34</sup> The statute also introduced the first formality of registration by requiring the author to deposit several copies of the work at official libraries.<sup>35</sup>

When the United States was founded, the desire to protect rights was still considered important and thus was included in the Constitution.<sup>36</sup> Early copyright law was limited in the scope of protection and the works that could be protected.<sup>37</sup> As time progressed and more types of works were developed, the scope of copyright law also expanded to encompass these creative works, including pictures, computer programs, music, and motion pictures.<sup>38</sup> The most recent comprehensive copyright statute enacted was the Copyright Act of 1976.<sup>39</sup>

The 1976 Act was enacted to respond to the changing mediums of expression and international protection.<sup>40</sup> Among other things, the 1976

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*Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 391–93 (2003).

<sup>31</sup> See *id.* at 392–93.

<sup>32</sup> See SCHECHTER & THOMAS, *supra* note 2, § 2.2.1.

<sup>33</sup> See *id.* § 2.2.2.

<sup>34</sup> Statute of Anne, 1710, 8 Ann. c. 19 (Eng.).

<sup>35</sup> See *id.*

<sup>36</sup> See U.S. CONST. art. I, § 8. “The Congress shall have Power . . . [t]o 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 . . .” *Id.*

<sup>37</sup> See, e.g., Copyright Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124. The 1790 Act provided for fourteen-year terms and the scope of the Act included maps, charts, and books. *Id.*

<sup>38</sup> FRANK H. ANDORKA, WHAT IS A COPYRIGHT? 8 (2001). For example, the Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075, 1075–80 (1909), changed the landscape of copyright law by establishing protection upon publication, extending the terms of exclusivity to twenty-eight years each, and establishing copyright formalities such as notice requirements.

<sup>39</sup> Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended primarily in scattered sections of 17 U.S.C.).

<sup>40</sup> H.R. REP. NO. 94-1476, at 47, 52–53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, (continued)

Act established that federal law preempted state copyright protection.<sup>41</sup> Congress took significant steps in allocating rights to both copyright owners and the public. One of the most notable features of the Act, particularly for the public side of the balance, was the codification of the fair use privilege.<sup>42</sup> Further, the Act moved to a single term of exclusivity that lasted through the author's life plus an additional fifty years.<sup>43</sup>

*B. A Brief Overview of Copyright Law*

The ultimate principle embedded in the copyright law is the preservation of the incentive theory that rewards authors balanced with the guarantee of public access and the free flow of information produced by the works.<sup>44</sup> The scope of copyright protection is limited to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."<sup>45</sup> In reality, any independent work with a scant degree of creative effort will satisfy the originality requirement.<sup>46</sup> Initially, computer

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5660, 5665–66.

<sup>41</sup> § 301, 90 Stat. at 2572.

<sup>42</sup> 17 U.S.C. § 107 (2000).

<sup>43</sup> § 302, 90 Stat. at 2572. The period was further amended by the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102(b), 112 Stat. 2827, 2827 (1998) (codified at 17 U.S.C. § 302), which extended the additional period to seventy years. The 1976 Act continued to impose the same formalities of notice and registration, but it also provided curative provisions in which enforcement could be saved from technical deficiencies. See §§ 401–12, 90 Stat. at 2576–83. However, the Berne Convention, via the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 7, 102 Stat. 2853, 2857–59 (1988), abolished traditional registration requirements as a precursor to copyright protection.

<sup>44</sup> See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). "[P]rivate motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. . . . When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose." *Id.* (citations omitted).

<sup>45</sup> 17 U.S.C. § 102 (2000). The categories of copyrighted works include "literary works"; "musical works"; "dramatic works"; "pantomimes and choreographic works"; "pictorial, graphic, and sculptural works"; "motion pictures and other audiovisual works"; "sound recordings"; and "architectural works." *Id.* From this point forward, the Copyright Act will be cited as currently codified in the United States Code.

<sup>46</sup> See ANDORKA, *supra* note 38, at 8; 1 NIMMER & NIMMER, *supra* note 25, § 2.01[A], at 2–7.

programs created a significant controversy in terms of eligible works.<sup>47</sup> However, both the legislative history and judicial interpretations clearly indicate that such programs are within the scope of copyrightable works.<sup>48</sup> Computer programs are encompassed under “literary works.”<sup>49</sup>

The Copyright Act delineates certain property rights and use privileges that are allocated between the author and the using public. Under § 201, “[c]opyright in a work protected under this title vests initially in the author or authors of the work.”<sup>50</sup> An author enjoys six exclusive rights: reproduction, adaptation, distribution, public performance, public display, and digital audio performance.<sup>51</sup> By virtue of *inclusio unius est exclusio alterius*,<sup>52</sup> the public can make other uses of the copyrighted work without infringing the author’s copyright.<sup>53</sup> Moreover, Congress has specifically

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<sup>47</sup> David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233, 1256 (2004).

<sup>48</sup> See, e.g., *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1247–48 (3d Cir. 1983); H.R. REP. NO. 94-1476, at 54 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5667.

<sup>49</sup> See 1 NIMMER & NIMMER, *supra* note 25, § 2.04[C], at 2-51.

<sup>50</sup> § 201.

<sup>51</sup> *Id.* § 106.

Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

*Id.*

<sup>52</sup> “A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative. For example, the rule that ‘each citizen is entitled to vote’ implies that noncitizens are not entitled to vote.” BLACK’S LAW DICTIONARY 602 (7th ed. 1999).

<sup>53</sup> ANDORKA, *supra* note 38, at 13.

codified exceptions such as fair use and secondary transmissions.<sup>54</sup> Infringement occurs when an entity, not otherwise granted permission by the owner, violates an exclusive right of the copyright holder.<sup>55</sup>

### C. *International Influence*

As markets converge and distribution technologies advance, international law enjoys an increased place of prominence in copyright regulation.<sup>56</sup> In 1996, the World Intellectual Property Organization (WIPO), an international body dedicated to intellectual property rights,<sup>57</sup> promulgated the WIPO Copyright Treaty.<sup>58</sup> Most importantly for this discussion, the signatories of the treaty were required to implement laws to protect technological measures that guard copyrighted works.<sup>59</sup> This international treaty ultimately led to the passage of the DMCA.<sup>60</sup>

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<sup>54</sup> See §§ 107–22.

<sup>55</sup> § 501. “Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a) . . . is an infringer of the copyright or right of the author, as the case may be.” *Id.*

<sup>56</sup> In an effort to ensure multi-national protection of intellectual property, the U.S. has entered into many multilateral agreements that have influenced modern copyright law, including the following: World Intellectual Property Organization Performances and Phonograms Treaty, *done* Dec. 20, 1996 S. TREATY DOC. NO. 105-17 (1997), 36 I.L.M. 76; World Intellectual Property Organization Copyright Treaty, *done* Dec. 20, 1996, S. TREATY DOC. NO. 105-17 (1997), 36 I.L.M. 65 [hereinafter WIPO Copyright Treaty]; Agreement on Trade-Related Aspects of Intellectual Property Rights, General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, annex 1C, *done* Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197; Berne Conventions for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221; Universal Copyright Convention, July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178; and the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, *done* Oct. 29, 1971, 25 U.S.T. 309, 866 U.N.T.S. 178.

<sup>57</sup> See WIPO, Medium-Term Plan for WIPO Program Activities—Vision and Strategic Direction of WIPO, <http://www.wipo.int/about-wipo/en/dgo/pub487.htm> (last visited Oct. 7, 2006).

<sup>58</sup> WIPO Copyright Treaty, *supra* note 56.

<sup>59</sup> *Id.* art. 11.

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict

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*D. The Digital Millennium Copyright Act*

The rise of the Internet and the digital age were the driving forces behind the DMCA.<sup>61</sup> Congress noted its concern with the ease in which complete and identical copies of copyrighted works could be electronically distributed.<sup>62</sup> It was feared that such technological capabilities would result in rampant infringement.<sup>63</sup> Furthermore, the DMCA satisfied the requirements imposed by the WIPO Copyright Treaty.<sup>64</sup> As one scholar described it, the enactment of the DMCA was the product of a “battle between Hollywood and Silicon Valley,”<sup>65</sup> which, among other things, added two substantive provisions regarding circumvention (§ 1201) and copyright management (§ 1202).<sup>66</sup> The former is the focus of this discussion and much controversy in the area of intellectual property.

*1. The Structure of § 1201 and Its Prohibitions*

Generally, § 1201 prohibits the circumvention of a technological measure that protects a copyrighted work.<sup>67</sup> Accordingly, anyone who circumvents a technological measure or traffics in a product that allows circumvention violates § 1201.<sup>68</sup> These added protections were granted to copyright holders so that their “monopoly privilege” would be preserved in

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acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

*Id.*

<sup>60</sup> See 144 CONG. REC. H7074, H7074 (daily ed. Aug. 4, 1998) (statement of Rep. Coble).

<sup>61</sup> See 144 CONG. REC. S4884, S4884 (daily ed. May 14, 1998) (statement of Sen. Hatch).

<sup>62</sup> See sources cited *supra* notes 5, 7.

<sup>63</sup> See S. REP. NO. 105-190, at 8 (1998); 144 CONG. REC. H7074, H7093 (daily ed. Aug. 4, 1998) (statement of Rep. Bliley).

<sup>64</sup> S. REP. NO. 105-190, at 2; see also notes 59–60 and accompanying text.

<sup>65</sup> Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 522–23 (1999).

<sup>66</sup> Neil A. Benchell, *The Digital Millennium Copyright Act: A Review of the Law and the Court's Interpretation*, J. MARSHALL J. COMPUTER & INFO. L. 1, 3 (2002). The DMCA also included a number of other provisions; namely, Titles II through V that addressed several unrelated copyright issues that will not be discussed.

<sup>67</sup> 1 NIMMER & NIMMER, *supra* note 25, § 12A.03, at 12A-14.

<sup>68</sup> See *id.*

the digital world.<sup>69</sup> Section 1201 addresses “technological measures that control access to a work” (§ 1201(a)) and those that permit access, but prevent the “unauthorized copying of the work” (§ 1201(b)).<sup>70</sup> In other words, the DMCA grants the copyright owner the ability to protect her work within a “castle” of protection, the invasion of which is prohibited by § 1201(a); however, as one author explained, “[I]f a guest invited inside the manor contravenes the seigneur’s edicts, then the trespass differs qualitatively from breaking and entering.”<sup>71</sup>

*a. Controlling Access—§ 1201(a)*

“Subsection (a) applies when a person has not obtained authorized access to a . . . work that is protected under the Copyright Act and for which the copyright owner has put in place a technological measure that effectively controls access to his or her work.”<sup>72</sup> This access protection is available in two forms. One court described that “Congress targeted not only those pirates who would *circumvent* these digital walls (the ‘anti-circumvention provisions,’ contained in 17 U.S.C. § 1201 (a)(1)), but also anyone who would *traffic* in a technology primarily designed to circumvent a digital wall (the ‘anti-trafficking provisions,’ contained in 17 U.S.C. § 1201 (a)(2), (b)(1)).”<sup>73</sup>

First, § 1201(a)(1) prohibits the actual circumvention<sup>74</sup> of “a technological measure that effectively controls access to a [protected] work.”<sup>75</sup> An example of a circumvention under § 1201(a)(1) is analogous to breaking into a safe to access and play a copyrighted music CD contained inside.<sup>76</sup> Realizing the possible adverse effects of this strong

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<sup>69</sup> 144 CONG. REC. H7074, H7093 (daily ed. Aug. 4, 1998) (statement of Rep. Bliley); Michael Landau, *Has the Digital Millennium Copyright Act Really Created a New Exclusive Right of Access?: Attempting to Reach a Balance Between Users’ and Content Providers’ Rights*, 49 J. COPYRIGHT SOC’Y U.S.A. 277, 286 (2001).

<sup>70</sup> SCHECHTER & THOMAS, *supra* note 2, § 7.7.2.

<sup>71</sup> David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 688 (2000).

<sup>72</sup> S. REP. NO. 105-90, at 28 (1998).

<sup>73</sup> *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 435 (2d Cir. 2001).

<sup>74</sup> 17 U.S.C. § 1201(a)(3)(A) (2000) provides, “[T]o ‘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.”

<sup>75</sup> *Id.* § 1201(a)(1)(A).

<sup>76</sup> See H.R. REP. NO. 105-551, pt. 1, at 17 (1998) (providing an analogous metaphor explaining the provision).

prohibition, Congress empowered the Librarian of Congress with rule-making power that effectively exempts particular classes of works from § 1201(a)(1).<sup>77</sup> The exemptions are aimed at protecting users of the exempted works that would otherwise be “adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works.”<sup>78</sup> However, such discretion has been narrowly applied and some critics doubt whether this rule-making power will provide substantial solutions to the perceived problems created by the DMCA.<sup>79</sup>

Second, with respect to “a technological measure [that] ‘*effectively controls access* to a work,’”<sup>80</sup> § 1201(a)(2) goes further to prohibit the *trafficking* in any technology that (A) “is primarily designed or produced for the purpose of circumventing,” (B) has little independent commercial significance, or (C) is marketed as a circumventing technology.<sup>81</sup> Section

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<sup>77</sup> § 1201(a)(1)(C). The Librarian of Congress, with the advice of the Register of Copyrights, promulgates rules under § 1201 every three-year period. *Id.* § 1201(a)(1)(B)–(C).

<sup>78</sup> *Id.* § 1201(a)(1)(B). The current exemptions, through October of 2006, are (1) compilations of internet domains blocked by commercial filtering software, (2) obsolete computer programs protected by dongles, (3) obsolete computer programs and video games where the rendering machine is no longer available in the commercial marketplace, and (4) e-books where all available editions prevent the read-aloud and special text functions. 37 C.F.R. § 201.40 (2004).

<sup>79</sup> See, e.g., Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 838–39 (2001); Heather E. Barrett, Comment, *The Digital Millennium Copyright Act and the Erosion of Fair Use in the Digital Age*, 7 INTELL. PROP. L. BULL. 13, 15–16 (2002); WebCast: Law and IT, a panel discussion hosted by Ernest Miller and ITconversations.com (Sept. 9, 2004), <http://www.itconversations.com/shows/detail201.html> (click on preferred presentation format hyperlink) [hereinafter Law and IT Webcast] (including panelists Ed Felten, professor of computer science at Princeton University; Michael Madison, professor of law at the University of Pittsburgh; and Wendy Seltzer, staff attorney at the Electronic Frontier Foundation).

<sup>80</sup> § 1201(a)(3) (emphasis added). “[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.” *Id.* § 1201(a)(3)(B).

<sup>81</sup> Section 1201(a)(2) provides,

(2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that — (A) is primarily designed or

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1201(a)(2) is a powerful tool for copyright owners because, unlike § 1201(a)(1), which is designed for individual instances of circumvention, § 1201(a)(2) empowers the copyright holder to enjoin the distribution of circumvention devices, thereby attacking the origin of enabling devices vis-à-vis the multitude of end users.<sup>82</sup> Notably, it has been generally understood that § 1201(a)(2) liability can exist without the presence of copyright infringement and thus circumvention itself would support a claim under the Act.<sup>83</sup>

*b. Protecting Owners' Exclusive Rights—§ 1201(b)*

Section 1201(b) differs from its § 1201(a) counterpart in that it does not prevent the circumvention of a technological measure in an effort to gain access to a copyrighted work; rather, it provides a second anti-trafficking provision that prohibits the circumventing of a technological measure that protects a right afforded to a copyright holder, for example, § 106 exclusive reproduction rights.<sup>84</sup> In other words, “the difference can be compared to breaking into another’s domain, as opposed to being permitted entry—but then proceeding to violate the host’s ‘house rules.’”<sup>85</sup> Similar to § 1201(a)(2), with respect to “technological measure[s] that effectively *protect[] a right* of a copyright owner,”<sup>86</sup> § 1201(b)(1) prohibits the trafficking in any technology that (A) is primarily designed for the purpose of circumventing, (B) has little independent commercial significance, or (C) is marketed as a circumventing technology.<sup>87</sup> Using

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produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title; (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or (C) is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

<sup>82</sup> Lunney, *supra* note 79, at 830.

<sup>83</sup> See Landau, *supra* note 69, at 287–88.

<sup>84</sup> Compare § 1201(a)(2) (prohibiting devices that circumvent “a technological measure that effectively controls access to a work”), with § 1201(b) (prohibiting devices that “[circumvent a] protection afforded by a technological measure that effectively protects a right of a copyright owner”).

<sup>85</sup> 1 NIMMER & NIMMER, *supra* note 25, § 12A.03[C], at 12A-32.

<sup>86</sup> § 1201(b)(1) (emphasis added).

<sup>87</sup> *Id.* Section 1201(b)(1) provides:

(continued)

the analogy above that described § 1201(a) as a means to prevent the breaking into a safe to *access* a music CD that awaited inside, § 1201(b) is aimed at protecting a technological measure embedded on the music CD that prevents its duplication vis-à-vis its playing.<sup>88</sup>

## 2. Section 1201 Exceptions and Preservations

Section 1201 includes several exemptions. These exemptions apply to (1) “nonprofit librar[ies], archives, and educational institution[s]”; (2) “law enforcement, intelligence, and other government activities”; (3) “reverse engineering”; (4) “encryption research”; (5) access monitoring for minors; (6) protection of personal identifying information; (7) “security testing”; and (8) “certain analog devices and certain technological measures.”<sup>89</sup> Furthermore, §1201(c) makes clear that the DMCA does not “affect rights, remedies, limitations, or defenses to copyright infringement, including fair use.”<sup>90</sup>

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(b) Additional Violations. — (1) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that — (A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; (B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or (C) is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

*Id.* § 1201(b)(1).

<sup>88</sup> This is because the technological measure is one that “protects a right of a copyright owner,” *id.* § 1201(b)(1)(A), namely the exclusive right to reproduce and distribute copies of the copyrighted work. *Id.* § 106; see 1 NIMMER & NIMMER, *supra* note 25, § 12A.03[D][3], at 12A-36 (illustrating this concept by describing the “Copy Switch” at issue in *RealNetworks, Inc. v. Streambox, Inc.*, No. C99-2070P, 2000 U.S. Dist. LEXIS 1889 (W.D. Wash. Jan. 18, 2000), discussed *infra* Part I.E.2).

<sup>89</sup> § 1201(d)–(k).

<sup>90</sup> *Id.* § 1201(c).

*E. Prior Cases Construing § 1201*

The DMCA rebalanced the traditional copyright compromise to favor the rights of the copyright holder.<sup>91</sup> This concept has encouraged an interpretation that views § 1201(a)(2) as a new property right enabling copyright holders to enjoin acts that circumvent a technological measure put in place to control access to their works, regardless of the presence of copyright infringement.<sup>92</sup> The following cases that led up to *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*<sup>93</sup> utilized a plain-reading interpretation of § 1201 to empower the copyright holder to foreclose the use and trafficking in of circumventing devices.

*1. Sony Computer Entertainment America, Inc. v. GameMasters*

Sony manufactures PlayStation gaming systems, games, and system accessories, which are then distributed to retailers for subsequent sale to the public.<sup>94</sup> The controversy in *GameMasters* involved Sony's PlayStation game console.<sup>95</sup> The PlayStation is an entertainment system that allows users to play interactive games by inserting a PlayStation CD, which is read by the game console.<sup>96</sup> PlayStation consoles are embedded with information that identifies the geographical territory where the console was distributed and sold.<sup>97</sup> "The PlayStation console is designed to operate only when encrypted data is read from a CD-ROM that verifies that the CD is an authorized, legitimate [Sony] product licensed for distribution in the same geographical territory of the console's sale."<sup>98</sup>

The Game Enhancer is an external device that allows the user to (1) temporarily alter the environment of PlayStation games by permitting the user to change the rules of the game and, more importantly, (2) "play games sold in Japan or Europe [that are] intended by [Sony] for use exclusively on Japanese or European PlayStation consoles."<sup>99</sup> "Games not licensed for distribution in the same territory as that of the console's sale cannot be played on the PlayStation without a device such as the Game

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<sup>91</sup> See LITMAN, *supra* note 4, at 151–52.

<sup>92</sup> See 1 NIMMER & NIMMER, *supra* note 25, § 12A.18[A]–[B], at 12A-185 to 12A-187.

<sup>93</sup> 381 F.3d 1178 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 923 (2005).

<sup>94</sup> *Sony Computer Entm't Am., Inc. v. GameMasters*, 87 F. Supp. 2d 976, 979–80 (N.D. Cal. 1999).

<sup>95</sup> *Id.* at 977–78.

<sup>96</sup> *Id.* at 979–80.

<sup>97</sup> *Id.* at 981.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

Enhancer.”<sup>100</sup> When the Game Enhancer is attached to the game console it bypasses the PlayStation operating system and supplies the authentication codes from an authorized game, after which the user is able to insert an unauthorized import for use on the system.<sup>101</sup> Essentially, the game console’s authentication protocol is circumvented by the Game Enhancer’s process of supplying valid codes thereby enabling the user to access the console to play otherwise unplayable imported games.<sup>102</sup>

Sony brought suit under § 1201(a)(2) seeking to enjoin the distribution of the Game Enhancer, and also alleged contributory copyright infringement.<sup>103</sup> GameMasters countered with a defense of copyright misuse, arguing that Sony sought “to enlarge the privileges bestowed by [copyright law]” and that its only purpose in seeking to enjoin the sale of the Game Enhancer was to eliminate competition for its rival product that offered the same features.<sup>104</sup>

Notably, the court found that Sony was not likely to prevail as a matter of law on the merits of its contributory copyright infringement claim, yet still granted a preliminary injunction based upon the § 1201(a)(2) claim.<sup>105</sup> With respect to the infringement claim, the court expressly stated, “[A] consumers [sic] choice to play the non-territorial game cannot be the infringing activity.”<sup>106</sup> “The games which the Game Enhancer enable[d] consumers to play upon the PlayStation [were] not necessarily illegal games, rather they may [have been] legitimate and authorized Sony products, but authorized only for sale in foreign territories such as Japan.”<sup>107</sup>

In granting a preliminary injunction in favor of Sony, the court found that the Game Enhancer appeared to violate § 1201(a)(2).<sup>108</sup> Specifically, the Game Enhancer’s sole purpose was in contravention of Sony’s intent to limit access to the games.<sup>109</sup> Thus, the Game Enhancer appeared to be a device whose primary function was to circumvent “a technological measure (or a protection afforded by a technological measure) that

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 981–82.

<sup>102</sup> *Id.* at 982.

<sup>103</sup> *Id.* at 977–79.

<sup>104</sup> *Id.* at 988–89.

<sup>105</sup> *Id.* at 987.

<sup>106</sup> *Id.* at 986.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 987.

<sup>109</sup> *Id.*

effectively controls access to a system protected by a registered copyright.”<sup>110</sup> The court handily refused to entertain GameMaster’s argument that Sony was essentially trying to use the DMCA as a means to stifle competition.<sup>111</sup> Here, the court affirmed Sony’s construction of the DMCA as a sound interpretation of the anti-circumvention provisions.<sup>112</sup>

## 2. RealNetworks, Inc. v. Streambox, Inc.

The anti-circumvention provisions were next applied in the realm of digital media.<sup>113</sup> RealNetworks is a market leader in multimedia software whose products enable content providers to “stream” audio and video files through an Internet connection to the end user.<sup>114</sup> When a media file is “streamed,” the file does not remain on the consumer’s computer.<sup>115</sup> Thus, in the absence of streaming technology or some form of digital rights management (DRM), it would be very easy for a user to attain, make, and circulate perfect copies of a copyrighted work.<sup>116</sup> The court in *RealNetworks* pointed out that many copyright holders depend on RealNetworks’s technology to make their content available in digital form.<sup>117</sup> Without it, the court stated, many copyright holders would not agree to give access to their works because the threat of piracy would be too great.<sup>118</sup>

Typically, once a media file is encoded into a RealMedia file, only a RealPlayer can play the file.<sup>119</sup> This relationship is established by a “Secret Handshake” between the RealServer, where the RealMedia file resides, and the RealPlayer that exists on the user’s computer.<sup>120</sup> If the requesting player is not a RealPlayer, the authentication process fails and the media file is not streamed to the user.<sup>121</sup> Additionally, RealNetworks

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<sup>110</sup> *Id.* (quoting 17 U.S.C. § 1201(a)(2)(A) (2000)).

<sup>111</sup> *Id.* at 988–89.

<sup>112</sup> *Id.* at 989.

<sup>113</sup> *See* *RealNetworks, Inc. v. Streambox, Inc.*, No. C99-2070P, 2000 U.S. Dist. LEXIS 1889, at \*1–\*3 (W.D. Wash. Jan. 18, 2000).

<sup>114</sup> *Id.* at \*3–\*4.

<sup>115</sup> *Id.* at \*3.

<sup>116</sup> *See id.* at \*4. For a further discussion of these distinctions, see, e.g., Bob Kohn, *A Primer on the Law of Webcasting and Digital Music Delivery*, 20 ENT. L. REP., Sept. 1998, at 4, available at WESTLAW, 20 NO. 4 Ent. L. Rep. 4.

<sup>117</sup> *RealNetworks*, 2000 U.S. Dist. LEXIS, at \*4.

<sup>118</sup> *See id.* at \*8.

<sup>119</sup> *Id.* at \*5.

<sup>120</sup> *Id.* at \*6.

<sup>121</sup> *Id.*

employs a “Copy Switch” that is embedded into the RealMedia file.<sup>122</sup> If the copyright holder disables the Copy Switch the user is able to save the file after streaming is complete.<sup>123</sup> If the Copy Switch is enabled, the streamed file will close and the user has no ability to save or download the file.<sup>124</sup> By using these two security measures, access to the copyrighted work is controlled in such a way as to prevent unauthorized downloading.<sup>125</sup> Similar to RealNetworks, Streambox creates several digital media software applications.<sup>126</sup>

Streambox designed and distributed three applications that took aim at RealNetworks’s family of products.<sup>127</sup> The Streambox VCR was designed to be used with RealNetworks’s RealPlayer.<sup>128</sup> The Streambox Ripper is a conversion utility used in converting RealMedia files into different formats.<sup>129</sup>

The function of the Streambox VCR was to mimic the presence of a RealPlayer, which would in turn circumvent the Secret Handshake authentication deployed by the RealServer in controlling access to the streaming content.<sup>130</sup> The VCR went further to circumvent a copy protection measure, the Copy Switch, by disregarding the encoding feature that indicated whether the streamed media could be saved by the end user.<sup>131</sup> In sum, the Streambox VCR embodied the two evils prohibited by § 1201 by enabling the circumvention of (1) the Secret Handshake access control measure (§ 1201(a)(2)) and (2) the Copy Switch protection measure (§ 1201(b)(1))—whereby the user was not only able to gain unauthorized access to the content, but also download the RealMedia files irrespective of the Copy Switch feature.<sup>132</sup>

The Streambox Ripper is an application that is capable of converting RealMedia files that reside on the user’s computer into other digital

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at \*6–\*7.

<sup>124</sup> *Id.* at \*7.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at \*10.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at \*10–\*11.

<sup>129</sup> *Id.* at \*14.

<sup>130</sup> *Id.* at \*11.

<sup>131</sup> *Id.*

<sup>132</sup> *See id.* at \*18–\*21.

formats, such as the popular MP3 format, so that they may be played by other player applications, or burned to a CD (WAV format).<sup>133</sup>

RealNetworks alleged that the Streambox VCR ran afoul of both anti-circumvention provisions (§ 1201(a)(2) and (b)(1)) because not only did the VCR circumvent an access control measure, it also circumvented a copy protection measure by bypassing its CopySwitch feature.<sup>134</sup> RealNetworks made no allegation of copyright infringement with respect to the Streambox VCR's ability to allow access to RealMedia files.<sup>135</sup>

RealNetworks also alleged that Streambox violated § 1201(b)(1) by trafficking in the Ripper because the application had no apparent significance outside of preparing derivative forms of the digital work, which is prohibited by § 106(2).<sup>136</sup>

In granting RealNetworks relief, the court analogized the Streambox VCR to a cable "blackbox" that descrambles a broadcast signal.<sup>137</sup> The court found that under § 1201(a)(3)(B), the Secret Handshake was a technological measure that controlled access to copyrighted digital media.<sup>138</sup> The court stated that "the VCR's circumvention of the Secret Handshake [was] enough, *by itself*, to create liability under Section 1201(a)(2)."<sup>139</sup> Furthermore, the court found that under § 1201(b)(2)(B), the Copy Switch protected against unauthorized copying of the digital file.<sup>140</sup> Consequently, using a plain reading of the statute, the court deemed the Streambox applications to violate of § 1201.<sup>141</sup> The court held that at a

<sup>133</sup> *Id.* at \*14.

<sup>134</sup> *See id.* at \*1, \*11–\*12.

<sup>135</sup> *See id.* at \*17.

<sup>136</sup> *See id.* at \*27.

<sup>137</sup> *Id.* at \*11–\*12.

<sup>138</sup> *Id.* at \*18 (citing § 1201(a)(3)(B)). A "measure 'effectively controls access' if it 'requires the application of information or a process or a treatment, with the authority of the copyright holder, to gain access to the work.'" *Id.* (quoting § 1201(a)(3)(B)).

<sup>139</sup> *Id.* at \*24–\*25 (emphasis added).

<sup>140</sup> *Id.* at \*18 (citing § 1201(b)(2)(B)). A "measure 'effectively protects' right of copyright holder if it 'prevents, restricts or otherwise limits the exercise of a right of a copyright owner.'" *Id.* at \*19 (quoting § 1201(b)(2)(B)).

<sup>141</sup> *See id.* at \*19–\*21. The court stated,

[U]nder the DMCA, a product or part thereof "circumvents" protections afforded a technological measure by "avoiding bypassing, removing, deactivating or otherwise impairing" the operation of that technological measure. 17 U.S.C. §§ 1201(b)(2)(A), 1201(a)(2)(A). Under that definition, at least a part of the Streambox VCR circumvents the

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minimum, the Streambox VCR was primarily designed to circumvent technological measures, in violation of sections 1201(a)(2)(A) and 1201(b)(1)(A), and had limited commercial viability outside of its circumventing purpose, in violation of sections 1201(a)(2)(B) and 1201(b)(1)(B).<sup>142</sup>

However, the court refused to grant relief regarding the Streambox Ripper.<sup>143</sup> The court cited many legitimate uses of the Ripper<sup>144</sup> and sidestepped a significant issue when it quickly passed over RealNetworks's argument that the proprietary RealMedia format served as a technological measure that prevented end-users from making derivative uses of the digital work.<sup>145</sup> Although the court did not conclude that a proprietary format could not serve as a technological measure, it did hold that in this case such an argument failed.<sup>146</sup> Essentially, the court found little reasoning that supported the conclusion "that content owners use the RealMedia format as a 'technological measure' to prevent end-users from making derivative works" or would object to such format conversion.<sup>147</sup>

### 3. Universal City Studios, Inc. v. Reimerdes

Probably the most notable decisions came from the DeCSS controversy.<sup>148</sup> In *Universal City Studios, Inc. v. Reimerdes*,<sup>149</sup> the plaintiff studios held the copyrights to a majority of the major motion pictures

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technological measures RealNetworks affords to copyright owners. Where a RealMedia file is stored on a RealServer, the VCR "bypasses" the Secret Handshake to gain access to the file. The VCR then circumvents the Copy Switch, enabling a user to make a copy of a file that the copyright owner has sought to protect.

*Id.* at \*19–\*20.

<sup>142</sup> *Id.* at \*20.

<sup>143</sup> *Id.* at \*29–\*30.

<sup>144</sup> *Id.* at \*27–\*28.

<sup>145</sup> *See id.* at \*28.

<sup>146</sup> *See id.*

<sup>147</sup> *Id.*

<sup>148</sup> *See* Tomas A. Lipinski, *Legal Reform in an Electronic Age: Analysis and Critique of the Construction and Operation of S. 487, The Technology, Education and Copyright Harmonization (TEACH) Act of 2001*, 2003 BYU EDUC. & L.J. 95, 131 n.92; Justin Graham, *Preserving the Aftermarket in Copyrighted Works: Adapting the First Sale Doctrine to the Emerging Technological Landscape*, 2002 STAN. TECH. L. REV. 1, ¶ 69, [http://stlr.Stanford.edu/stlr/Articles/02\\_STLR\\_1](http://stlr.Stanford.edu/stlr/Articles/02_STLR_1).

<sup>149</sup> 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).

distributed in the entertainment market.<sup>150</sup> In the mid-1990s, the industry made the transition from analog videocassettes to digital versatile discs (DVDs).<sup>151</sup> To prevent piracy, the movie studios and representatives of the technology industry developed and adopted the Content Scramble System (CSS) encryption technology.<sup>152</sup>

CSS is an encryption algorithm that encodes audio and graphic files.<sup>153</sup> The CSS encryption serves as an access control and copy protection measure for DVDs such that the content of the DVD can only be viewed by applying a set of decryption keys found on authorized players.<sup>154</sup> Authorized players are “players and computer drives equipped with licensed technology that permits the devices to decrypt and play—but not to copy—the films.”<sup>155</sup> The developers of the CSS encryption have licensed the decryption keys to numerous manufacturers of DVD players and computer drives under “strict security requirements” that ensure the secrecy of the decryption keys.<sup>156</sup>

A group of computer hackers developed what came to be known as DeCSS after reverse engineering a compliant DVD player that was equipped with the CSS algorithm and decryption keys.<sup>157</sup> DeCSS circumvented the CSS technology that protected the DVD from being accessed by non-compliant DVD players.<sup>158</sup> This was accomplished by simulating the presence of the decryption keys used in licensed devices, thereby unlocking the copyrighted material.<sup>159</sup> Thus, when DeCSS is employed, the user is able to decode, play, and copy the copyrighted DVD despite the existence of CSS protection.<sup>160</sup> Movies viewed and copied with the DeCSS decryption were “virtually identical” in quality to the originals.<sup>161</sup> After the development of DeCSS, one of the defendants

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<sup>150</sup> *See id.* at 308.

<sup>151</sup> *Id.* at 309.

<sup>152</sup> *See id.* at 308–09.

<sup>153</sup> *Id.* at 309–10.

<sup>154</sup> *See id.* at 310.

<sup>155</sup> *Id.* at 303.

<sup>156</sup> *Id.* at 308, 310. “The licensing function initially was performed by MEI and Toshiba. Subsequently, MEI and Toshiba granted a royalty free license to the DVD Copy Control Association (‘DVD CCA’), which now handles the licensing function.” *Id.* at 310 n.60.

<sup>157</sup> *See id.* at 311.

<sup>158</sup> *Id.* at 303, 311.

<sup>159</sup> *See id.* at 311.

<sup>160</sup> *Id.* at 303.

<sup>161</sup> *Id.* at 313.

posted the source code for download and the defendants hosted a list of links offering the same on their website.<sup>162</sup>

Eight major motion picture studios brought suit under § 1201(a)(2) in the Southern District Court of New York to enjoin the distribution of the DeCSS code.<sup>163</sup> Notably, the plaintiff studios did not make a claim of copyright infringement.<sup>164</sup> The defendants raised a host of arguments including the following: (1) the DMCA was not meant to apply to computer code,<sup>165</sup> (2) the purchasing user had the implicit authority to use the work and thus decrypt the work,<sup>166</sup> (3) because the encryption was relatively weak it could not qualify as “effectively” controlling access to a work,<sup>167</sup> and (4) the DeCSS code was designed to enable interoperability with Linux operating systems, which were unable to play CSS protected DVDs.<sup>168</sup>

In its discussion of § 1201(a)(2), the court found that the DeCSS utility was unquestionably a technology that descrambled, decrypted, and bypassed the CSS protection without the authority of the copyright holder, necessarily circumventing a technological measure meant to control access to a copyrighted work.<sup>169</sup> Consequently, the defendants’ posting of DeCSS violated § 1201(a)(2).<sup>170</sup> In so holding, the court dismissed several arguments put forth by the defendants<sup>171</sup> and established a profound reach of the DMCA.

With respect to the scope of the Act, the court made two seemingly straightforward findings. First, the court disregarded the limited scope<sup>172</sup> argument offered by the defendants by utilizing a plain reading of the

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<sup>162</sup> *Id.* at 311–12.

<sup>163</sup> *Id.* at 308, 316–17.

<sup>164</sup> *Id.* at 322 (“Defendants, however, are not here sued for copyright infringement. They are sued for offering and providing technology designed to circumvent technological measures that control access to copyrighted works and otherwise violating Section 1201(a)(2) of the Act.”).

<sup>165</sup> *Id.* at 317 n.135.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 317.

<sup>168</sup> *Id.* at 319.

<sup>169</sup> *See id.* at 317.

<sup>170</sup> *See id.* at 319.

<sup>171</sup> *See id.* at 317, 319.

<sup>172</sup> Relying on the legislative history of the act, the defendants argued that § 1201 was meant to apply to “conventional devices, specifically ‘black boxes,’ as opposed to computer code.” *Id.* at 317 n.135.

statute, which defines its scope to include “any technology.”<sup>173</sup> Consequently, even the distribution of un-compiled computer code falls within the ambit of the Act’s prohibitions.

Second, the court noted that just because the CSS encryption scheme was a relatively weak protection, it did not follow that such a scheme failed as a mechanism that effectively controlled access to copyrighted works.<sup>174</sup> Rather, “if, in the ordinary course of its operation, a technology actually works in the defined ways to control access to a work . . . then the “effectiveness” test is met, and the prohibitions of the statute are applicable.”<sup>175</sup> Thus, because CSS actually worked to protect access in the absence of a countervailing decryption utility, the measure qualified as one that effectively controlled access as defined by the statute.<sup>176</sup>

The court’s opinion also included two other nuances that, when taken together, establish an important concept regarding what a consumer may do with media protected by a § 1201 technological measure. The concept is comprised of the idea of authorization and interoperability.

First, the court acknowledged that under the DMCA, there could not be a circumvention unless the act is “without the authority of the copyright owner.”<sup>177</sup> However, the court dismissed the issue of authority without much substantive reasoning. The defendants argued that by purchasing the DVD the user had the implicit right to decrypt the work, but the court deemed this reasoning as “pure sophistry” and a “corruption of the first sale doctrine.”<sup>178</sup> Still, there was no mention of the issue of whether the user has the right to *strictly play* the work on any player of his choosing, namely one that employs the DeCSS utility as a means of playing the disc.

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<sup>173</sup> *Id.* (quoting 17 U.S.C. § 1201(a)(2) (2000)).

<sup>174</sup> *See id.* at 317–18.

<sup>175</sup> *Id.* at 318 (quoting H. COMM. ON THE JUDICIARY, 105TH CONG., SECTION-BY-SECTION ANALYSIS OF H.R. 2281 AS PASSED BY THE UNITED STATES HOUSE OF REPRESENTATIVES ON AUGUST 4, 1998, at 10 (Comm. Print 1998)).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* (quoting § 1201(a)(3)(A)).

<sup>178</sup> *Id.*

Second, by using a strict application of the statute<sup>179</sup> the court defeated one of the defendants' most promising arguments.<sup>180</sup> The defendants took the position that DeCSS was mainly designed to enable the playing of DVDs on the Linux operating system.<sup>181</sup> The Linux operating system needed the DeCSS utility because there were no compliant or compatible DVD players for the platform.<sup>182</sup> This argument sought to establish a legitimate use by virtue of interoperability.<sup>183</sup> However, the court found any underlying motive immaterial in deciding whether DeCSS violated the DMCA.<sup>184</sup> Here, the facts clearly showed the occurrence and promotion of a circumvention technology, which is forbidden by § 1201(a)(2) regardless of why it was created.<sup>185</sup>

These latter two points seem to suggest that the position of this court is that a consumer does not have the option to play media protected under § 1201(a) in any manner other than that prescribed by the copyright holder,

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<sup>179</sup> The court stated,

[T]he question whether the development of a Linux DVD player motivated those who wrote DeCSS is immaterial to the question whether the defendants now before the Court violated the anti-trafficking provision of the DMCA. The inescapable facts are that (1) CSS is a technological means that effectively controls access to plaintiffs' copyrighted works, (2) the one and only function of DeCSS is to circumvent CSS, and (3) defendants offered and provided DeCSS by posting it on their web site. 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). The offering or provision of the program is the prohibited conduct—and it is prohibited irrespective of why the program was written, except to whatever extent motive may be germane to determining whether their conduct falls within one of the statutory exceptions.

*Id.* at 319.

<sup>180</sup> *See id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Under § 1201(f) it is permissible to “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.” 17 U.S.C. § 1201(f) (2000).

<sup>184</sup> *Reimerdes*, 111 F. Supp. 2d at 319.

<sup>185</sup> *Id.*

even if the only purpose is to legitimately play the work. In any case, the court held that the DMCA clearly resolved the parties' competing contentions.<sup>186</sup> Here, the defendants clearly violated the plain language of the anti-circumvention provisions and the plaintiff studios were entitled to injunctive and declaratory relief.<sup>187</sup>

4. *The Reimerdes Appeal in Universal City Studios, Inc. v. Corley*

After *Reimerdes*, defendants Corley and his 2600 Enterprises, Inc.<sup>188</sup> appealed to the Second Circuit Court of Appeals.<sup>189</sup> The opinion was primarily committed to Corley's constitutional claims.<sup>190</sup> Ultimately, the court affirmed the decision in *Reimerdes*.<sup>191</sup>

The court did briefly discuss the issue of authorization by the copyright owner.<sup>192</sup> Again, the defendants argued that the purchaser of the DVD has the implicit authority of the copyright owner to view the DVD.<sup>193</sup> Thus, the presence of authority barred the application of the § 1201(a) because the statute only prohibits circumvention without the authority of the copyright owner according to the defendants.<sup>194</sup> The court declared the argument flawed based on what it called a misreading of §1201(a)(3)(A).<sup>195</sup> It explained that § 1201(a)(3)(A) exempts authorized decryption, not authorized viewing.<sup>196</sup> However, the court did little to make sense of the distinction. Early in its opinion the court echoed the conclusion of the trial court that the CSS encryption was an access control measure, meaning it did not merely prevent copying, but controlled access to the work.<sup>197</sup> With that being said, it is unclear how the user could view

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<sup>186</sup> *Id.* at 346.

<sup>187</sup> *Id.* The last component of the *Reimerdes* decision was largely a constitutional challenge, *see id.* at 325–39, which falls outside the scope of this Note.

<sup>188</sup> The claims against Reimerdes and Kazan were settled and 2600 Enterprises, Inc. was added as a defendant. 273 F.3d 429, 440 n.8 (2d Cir. 2001).

<sup>189</sup> *Id.* at 429.

<sup>190</sup> *Id.* at 443–60.

<sup>191</sup> *Id.* at 459–60.

<sup>192</sup> *Id.* at 444.

<sup>193</sup> *Id.* (“Appellants argue that an individual who buys a DVD has the ‘authority of the copyright owner’ to view the DVD, and therefore is exempted from the DMCA pursuant to subsection 1201(a)(3)(A) when the buyer circumvents an encryption technology in order to view the DVD on a competing platform . . .”).

<sup>194</sup> *See id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *See id.* at 436–37. The court stated:

(continued)

the DVD without necessarily decrypting it. It seems clear that the user receives permission to view the DVD upon purchase.<sup>198</sup> In any case, the court found that the appellants did not offer evidence to show explicit or implicit authorization for user decryption.<sup>199</sup>

5. Lexmark International, Inc. v. Static Control Components, Inc.<sup>200</sup>

Lexmark International, Inc. (Lexmark) manufactures and sells a series of laser printers.<sup>201</sup> Lexmark also manufactures and sells printer cartridges for use in its line of laser printers.<sup>202</sup> Lexmark printers and the cartridges used in their operation are managed by two of Lexmark's copyrighted programs, the Toner Loading Program and the Printer Engine Program.<sup>203</sup> "The Printer Engine Program resides within the Lexmark T-Series printers and controls various operations of the printer including, for example, paper feed, paper movement, motor control, fuser operation, and voltage control for the electrophotographic (EP) system."<sup>204</sup> "The Toner Loading Programs reside within microchips attached to the toner cartridges for Lexmark's T-Series printers [and] enable the printers to approximate the amount of toner remaining in the toner cartridges."<sup>205</sup> The printer's Printer Engine Program uses the toner information generated by the Toner Loading Program to report system information to the user.<sup>206</sup>

"To protect the [copyrighted] Programs and to prevent unauthorized toner cartridges from being used . . . , Lexmark use[d] an authentication

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Without the player keys and the algorithm, a DVD player cannot access the contents of a DVD. With the player keys and the algorithm, a DVD player can display the movie on a television or a computer screen, but does not give a viewer the ability to use the copy function of the computer to copy the movie or to manipulate the digital content of the DVD.

*Id.* at 437.

<sup>198</sup> This is intuitive because the only motivation to purchase a DVD is in fact to view its contents.

<sup>199</sup> *Corley*, 273 F.3d at 444.

<sup>200</sup> 253 F. Supp. 2d 943 (E.D. Ky. 2003), *vacated by* 387 F.3d 522 (6th Cir. 2004).

<sup>201</sup> *Id.* at 946.

<sup>202</sup> *Id.* at 946–47. A printer cartridge is an exhaustible device that is inserted into the printer and provides toner ink for printing. *Id.* at 947.

<sup>203</sup> *Id.* at 948–49.

<sup>204</sup> *Id.* at 948.

<sup>205</sup> *Id.* at 949.

<sup>206</sup> *Id.*

sequence that runs each time a toner cartridge is inserted into a Lexmark printer, the printer is powered on, or whenever the printer is opened and closed.<sup>207</sup> The authentication sequence is a process where both the printer and the cartridge microchip generate a Message Authentication Code (MAC), which is followed by the cartridge transmitting its MAC to the printer for comparison.<sup>208</sup> If the values match, the authentication sequence is successful; if they differ the authentication fails.<sup>209</sup> Upon successful authentication, the printer will recognize the authorized toner cartridge and allow access to both the Printer Engine and Toner Loading Programs.<sup>210</sup> Conversely, if an unauthorized toner cartridge is inserted, the authentication process will fail whereby the printer will generate an error message and disable the Printer Engine and Toner Loading Programs.<sup>211</sup>

Print cartridges are remanufactured by third parties for subsequent sale to the public.<sup>212</sup> These third party manufacturers compete with the original manufacturer for aftermarket ink and toner sales.<sup>213</sup> Static Control Components, Inc. (Static Control) manufactures microchips used in the cartridge remanufacturing industry.<sup>214</sup> This case centered on Static Control's SMARTEK microchip that is used in remanufactured toner cartridges for use in Lexmark laser printers.<sup>215</sup>

In the remanufacturing process, Static Control's SMARTEK microchip is used as a replacement for the microchip found in authorized Lexmark cartridges.<sup>216</sup> Static Control marketed the SMARTEK as a circumventing chip that sends "the *right* message[]" to bypass the Lexmark "secret code."<sup>217</sup> In its findings, the court found that by their own admission Static Control (1) designed the SMARTEK chip to circumvent Lexmark's authentication sequence and (2) the microchip had no independent commercial purpose.<sup>218</sup> Furthermore, the SMARTEK microchip circumvented the authentication procedure by mimicking an authorized

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<sup>207</sup> *Id.* at 952.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 952–53.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 948.

<sup>213</sup> *See id.*

<sup>214</sup> *Id.* at 946–47.

<sup>215</sup> *Id.* at 947.

<sup>216</sup> *Id.* at 955.

<sup>217</sup> *Id.* at 956.

<sup>218</sup> *Id.* at 955.

Lexmark print cartridge.<sup>219</sup> Here, the SMARTEK microchips “deceived” the Lexmark printer into accepting the remanufactured cartridge as an original microchip resident on authorized Lexmark cartridges.<sup>220</sup>

Lexmark brought suit under § 1201(a)(2) alleging “that the SMARTEK microchip circumvent[ed] a technological measure that control[led] access to Lexmark’s Toner Loading Programs and its Printer Engine Programs.”<sup>221</sup> Lexmark also alleged copyright infringement.<sup>222</sup> Like the defendants in *Reimerdes*, Static Control urged the court to consider the legislative history of the Act that seemingly pointed to Congress’s intent only to target digital piracy of works with independent market value.<sup>223</sup> In addition, Static Control claimed the reverse engineering exception found in § 1201(f) applied to the SMARTEK technology.<sup>224</sup>

The court began its analysis by rejecting the invitation to consider the legislative intent behind the enactment of the DMCA because it determined the language was clear on its face.<sup>225</sup> The court stated, “The DMCA broadly prohibits trafficking in a product or device that circumvents ‘a technological measure that effectively controls access to a work protected under this title.’”<sup>226</sup> Thus, the court concluded that if the work is protected under the copyright provisions then § 1201(a) applies.<sup>227</sup> Lastly, the court rejected the reverse engineering exception found in § 1201(f) because the court explained that “[s]ections 1201(f)(2) and (3) of the DMCA are not broad exceptions that can be employed to excuse any behavior that makes some device ‘interoperable’ with some other device.”<sup>228</sup>

The court concluded that Lexmark established two valid claims under § 1201(a)(2).<sup>229</sup> First, the authentication sequence used between the printer and cartridge microchip “constitute[d] a ‘technological measure’ that ‘controls access’ to a copyrighted work,” namely the Printer Engine

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 968.

<sup>221</sup> *Id.* at 947.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 969.

<sup>224</sup> *See id.* at 970–71.

<sup>225</sup> *Id.* at 969.

<sup>226</sup> *Id.* (quoting 17 U.S.C. § 1201(a)(2)(A)–(B) (2000)).

<sup>227</sup> *Id.* at 969–70.

<sup>228</sup> *Id.* at 970.

<sup>229</sup> *Id.* at 966–69.

Program and the Toner Loading Program.<sup>230</sup> The court explained that “Lexmark’s authentication sequence effectively ‘controls access’ to the Toner Loading Programs and the Printer Engine Program because it control[ed] the consumer’s ability to make use of these programs.”<sup>231</sup> Second, Lexmark satisfied all three independent tests in § 1201(a)(2).<sup>232</sup> For both the Printer Engine and the Toner Loading Program, Static Control: (1) “specifically developed the SMARTEK microchips to circumvent [Lexmark’s] authentication sequence that control[ed] access” to the copyrighted programs, (2) acknowledged that the “SMARTEK microchips [had] no [independent] commercial purpose other than to circumvent [Lexmark’s technological measure] that control[ed] access to” the copyrighted programs, and (3) marketed the SMARTEK microchip as a circumvention device for Lexmark printers.<sup>233</sup> In granting injunctive relief, the court cited both *GameMasters* and *RealNetworks* as in accord with its analysis and found the facts of the case analogous to those in *GameMasters* where Sony employed similar protections.<sup>234</sup>

## II. DISCUSSION

In 2003, Chamberlain filed suit against Skylink claiming its universal remote transmitter violated § 1201(a)(2) of the DMCA by circumventing a technological measure (the “rolling code” technology) implemented in its “Security+” garage door opener system.<sup>235</sup> In *Chamberlain I*, Chamberlain moved for summary judgment with respect to its claim under § 1201(a)(2),<sup>236</sup> which the district court denied.<sup>237</sup> Skylink then filed its own motion for summary judgment on the same DMCA claim.<sup>238</sup> The

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<sup>230</sup> *Id.* at 967–68.

<sup>231</sup> *Id.* at 968.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 968–69.

<sup>234</sup> *Id.* at 969–70.

<sup>235</sup> *Chamberlain Group, Inc. v. Skylink Techs., Inc. (Chamberlain I)*, 292 F. Supp. 2d 1023, 1024–25 (N.D. Ill. 2003). Chamberlain also included claims of unfair and deceptive business practices under the Lanham Act, the Illinois Consumer Fraud and Deceptive Business Practices Act, and the Uniform Deceptive Trade Practices Act, along with claims of patent infringement, none of which are germane to this discussion. *Id.*

<sup>236</sup> *Id.* at 1033.

<sup>237</sup> *Id.* at 1040.

<sup>238</sup> *Chamberlain Group, Inc. v. Skylink Techs., Inc. (Chamberlain II)*, 292 F. Supp. 2d 1040, 1041 (N.D. Ill. 2003), *aff’d*, 381 F.3d 1178 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 923 (2005).

district court granted Skylink's motion in *Chamberlain II*,<sup>239</sup> prompting Chamberlain's appeal to the Federal Circuit. In August 2004, the Federal Circuit decided Chamberlain's appeal from the second ruling of the district court as a matter of first impression.<sup>240</sup> The *Chamberlain III* decision is the first to deviate from the strict application of § 1201 as illustrated in the background cases. Furthermore, the decision provides a significant degree of authoritative weight for litigants, as the Federal Circuit became only the second U.S. Court of Appeal to apply § 1201(a)(2).<sup>241</sup>

#### A. Facts

Chamberlain is a garage door opener (GDO) manufacturer that sells a variety of GDO systems in the residential home owner market.<sup>242</sup> Chamberlain's "Security+" line of garage door systems feature a "rolling code" technology that continually changes the code required to operate the GDO unit.<sup>243</sup> Skylink Technologies is engaged in the distribution and marketing of garage door system components.<sup>244</sup> Skylink's Model 39 universal transmitter (a universal remote) is capable of bypassing the

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<sup>239</sup> *Id.* at 1046.

<sup>240</sup> *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1181, 1185 (Fed. Cir. 2004), *cert. denied* 544 U.S. 923 (2005). The only circuit court to previously consider the anti-circumvention provisions was the Second Circuit in *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001), which largely focused on constitutional issues. *Chamberlain*, 381 F.3d at 1185.

<sup>241</sup> *See Chamberlain*, 381 F.3d at 1185. In reality, it is the first appellate decision to discuss § 1201(a) at length as *Corley* mainly focused on constitutional issues surrounding the application of the anti-circumvention provisions. Further, it should be noted that shortly after *Chamberlain*, the Sixth Circuit took its turn when it handed down its decision in *Lexmark International, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004), which will be discussed *infra*.

<sup>242</sup> *Chamberlain Group, Inc. v. Skylink Techs., Inc. (Chamberlain I)*, 292 F. Supp. 2d 1023, 1025–26 (N.D. Ill. 2003).

<sup>243</sup> *Id.* GDOs are uniform in terms of their basic operation and system components. *See id.* The GDO is almost universally mounted on the garage ceiling and consists of a remote transmitter and a control unit. *Id.* The control unit consists of a radio frequency (RF) receiver, processor, and a mechanical motor, which controls the physical opening and closing of the garage door. *Id.* When the user depresses the remote transmitter, the transmitter broadcasts a RF signal to the receiver, which engages the motor to either open or close the door. *Id.* It is this transmitted signal and its generation that are at issue in *Chamberlain*.

<sup>244</sup> *Id.* at 1025.

rolling code technology and operating the Security+ line of GDO as if it were an authentic Chamberlain remote.<sup>245</sup>

### 1. Chamberlain's Security+ GDO

To protect against inadvertent or unauthorized operation of a GDO system, the manufacturer employs a unique identifier that associates the remote transmitter to the base control unit.<sup>246</sup> However, most GDO transmission codes are static,<sup>247</sup> this presents a security problem when an unauthorized party "records" the transmitted signal with a "code grabber" and later "replays" the code to gain access to the garage.<sup>248</sup> To combat this problem, Chamberlain's Security+ GDOs utilize a "rolling code" system.<sup>249</sup> The Security+ rolling code system differs from traditional GDO systems in that its transmission code is dynamic.<sup>250</sup> Thus, the transmission code changes with use and previous signals will not be recognized by the processor, which eliminates the effectiveness of unauthorized signals recorded from previous transmissions.<sup>251</sup> Chamberlain accomplishes the rolling code protection by using a copyrighted computer program in both the remote transmitter and the receiver.<sup>252</sup>

Essentially, the control unit computer program "has two functions: (1) to verify the rolling code and (2) once the rolling code is verified, to activate the GDO motor, by sending instructions to a microprocessor in the GDO."<sup>253</sup> Upon initial use, the two programs that reside in the remote and control units are synchronized with the same fixed identifier and rolling code value.<sup>254</sup> Subsequently, each encoded transmission is comprised of a fixed identifier that associates the remote to the control unit and a rolling code value.<sup>255</sup> Each time the GDO system is engaged, the rolling code value is increased by a factor of three.<sup>256</sup> To actuate the GDO, the transmitted signal must contain a rolling code value that satisfies the

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<sup>245</sup> *Id.* at 1026.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 1026–27.

<sup>249</sup> *Id.* at 1027.

<sup>250</sup> *Id.*

<sup>251</sup> *See id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 1028.

<sup>254</sup> *See id.* at 1027–28.

<sup>255</sup> *Id.* at 1027.

<sup>256</sup> *Id.*

Security+ authentication rules.<sup>257</sup> First, the rolling code value must not be within the “rear window,” which includes the 1,024 values preceding the rolling code value currently stored in the control unit memory.<sup>258</sup> Second, the rolling code value must fall within the range of the “forward window,” which extends through the 4,096 values following the rolling code value currently stored in the control unit memory.<sup>259</sup> If these two tests are met, then the GDO control unit will activate the motor; otherwise, the GDO system will not operate without engaging the resynchronization process.<sup>260</sup> Thus, because the signal and window values “roll” with use, the Security+ GDO reduces the effectiveness of fabricated or previously recorded signals that would otherwise allow unauthorized use. In sum, the copyrighted “computer program has a protective measure that protects itself” from unauthorized use.<sup>261</sup>

Chamberlain designed the resynchronization feature for circumstances in which the user would “exhaust the entire forward window” on the remote transmitter by multiple clicks of the remote’s button while outside the range of the control unit.<sup>262</sup> The resynchronization process consists of the user sending two numeric signals separated by a factor of three to the control unit in rapid sequence.<sup>263</sup> The resynchronization feature will then reset the stored values for the “rear” and “forward” windows and activate the GDO motor.<sup>264</sup>

## 2. *The Circumvention Technology*

Universal remote transmitters serve as replacement remote controls capable of operating the control unit of a GDO system.<sup>265</sup> Chamberlain and Skylink are the two major distributors of aftermarket (universal) remote transmitters.<sup>266</sup>

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<sup>257</sup> See *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1184 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 923 (2005).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *See id.*

<sup>261</sup> *Id.* at 1185.

<sup>262</sup> *Id.* at 1184.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Chamberlain Group, Inc. v. Skylink Techs., Inc. (Chamberlain I)*, 292 F. Supp. 2d 1023, 1030 (N.D. Ill. 2003).

<sup>266</sup> *Id.* at 1031. In fact, Chamberlain’s “Clicker” brand of universal transmitter is a direct competitor with Skylink’s Model 39 transmitter at issue in this case. *Id.*

Skylink's Model 39 transmitter is capable of operating many GDO systems, including the Security+ line.<sup>267</sup> Notably, Skylink marketed its Model 39 transmitter as "compatible with the 'latest Rolling Code Technology.'"<sup>268</sup> To achieve compatibility, the Security+ GDO must be programmed to recognize the Model 39 transmitter.<sup>269</sup> Upon the initial programming, the components are associated by an identical fixed identifier so that the Model 39 transmitter and the Security+ GDO may function together as one system.<sup>270</sup> In its operation, the Model 39 transmitter does not use a dynamic rolling code like the Chamberlain model; it bypasses the authentication procedure by simulating the Security+ resynchronization process.<sup>271</sup> Here, each time the user engages the Skylink remote, the device transmits multiple fixed values that represent user resynchronization.<sup>272</sup> These three values satisfy Chamberlain's authentication procedure, which requires the values to be outside the "rear" and within the "forward" window separated by a factor of three.<sup>273</sup> Essentially, the Skylink transmitter resets and actuates the control unit every time the user presses the remote.

### 3. *The § 1201 Claim*

Chamberlain asserted that the rolling code function of the computer program served as "a technological measure that 'effectively controls access to a work,'" namely the operating function of the computer program that controls the Security+ GDO.<sup>274</sup> Thus, Chamberlain claimed that the Skylink Model 39 Transmitter violated § 1201(a)(2) by "circumvent[ing] a protective measure . . . that controls access to its copyrighted computer program."<sup>275</sup> Chamberlain sought to establish liability under all three theories of § 1201(a)(2).<sup>276</sup> Chamberlain did not allege that Skylink infringed its copyright in any regard.<sup>277</sup>

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<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 1032.

<sup>269</sup> *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1185 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 923 (2005).

<sup>270</sup> *See Chamberlain I*, 292 F. Supp. 2d at 1032.

<sup>271</sup> *See id.* at 1031–32.

<sup>272</sup> *Id.* at 1032.

<sup>273</sup> *See id.* at 1029.

<sup>274</sup> *Id.* at 1035.

<sup>275</sup> *Id.* at 1033.

<sup>276</sup> *Id.* at 1035. Accordingly, Chamberlain alleged Skylink violated § 1201(a)(2) because Skylink's Model 39: (1) was designed to circumvent the Security+ rolling code  
(continued)

In response to Chamberlain's allegations, Skylink set forth several arguments.<sup>278</sup> Most importantly, Skylink claimed that "consumers use[d] the Model 39 transmitter to activate the Security+ GDOs with Chamberlain's consent."<sup>279</sup> Additionally, Skylink claimed that: (1) the Model 39 transmitter had "a variety of functions" independent of the Security+ system, (2) the Security+ GDO did not contain a copyrighted program, (3) the § 1201(f) safe harbor provision applied, and (4) the rolling code technology "protects an uncopyrightable process."<sup>280</sup>

*B. The District Court's Ruling on Chamberlain's Motion for Summary Judgment*

The district court turned first to the purpose of Skylink's Model 39 universal remote.<sup>281</sup> Chamberlain and Skylink both relied on language in *Reimerdes* and *RealNetworks* to support their respective positions under § 1201(a)(2)(A) and (B).<sup>282</sup> Chamberlain argued that the Model 39 transmitter had a setting that lacked any commercial significance other than a circumvention device because it was devoted entirely to operating its Security+ GDO, which "by itself establish[ed] Skylink's liability under the DMCA."<sup>283</sup> Skylink, on the other hand, argued that the Model 39 transmitter was capable of operating several different GDO systems, including those not manufactured by Chamberlain.<sup>284</sup> Therefore, Skylink contended that *Reimerdes* and *RealNetworks* support the position that "if the product serves any legitimate purpose, Section 1201(a)(2)(A) and (B) should not apply."<sup>285</sup>

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technological measure in an effort to access Chamberlain's copyrighted program (§ 1201(a)(2)(A)); (2) had limited commercial use outside of circumventing and operating the Security+ GDO (§ 1201(a)(2)(B)); and (3) was marketed as a circumvention device capable of circumventing rolling code technology and operating Chamberlain's Security+ GDO (§ 1201(a)(2)(C)). *Id.*

<sup>277</sup> *Id.* at 1031–32 ("Chamberlain has not charged Skylink with copyright infringement or contributory infringement in developing and marketing the Model 39 software . . .").

<sup>278</sup> *Id.* at 1035.

<sup>279</sup> *Id.* The issue of authorization is an important consideration in the context of § 1201(a) because its prohibitions only apply to unauthorized access. See 17 U.S.C. § 1201(a)(3)(A) (2000).

<sup>280</sup> *Chamberlain I*, 292 F. Supp. 2d at 1035–36.

<sup>281</sup> *Id.* at 1036.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 1037.

The district court disagreed with Skylink's interpretation of the cases and the construction of the statute.<sup>286</sup> The court distinguished *Reimerdes* from the case at hand because *Reimerdes* involved a product with only one ultimate purpose: to circumvent DVD encryption.<sup>287</sup> Further, the court stated that the holding in *Reimerdes* did "not establish that a product that has multiple purposes is exempt from the DMCA."<sup>288</sup> With respect to *RealNetworks*, the court noted that the product there (the Streambox VCR) had multiple uses, both legitimate and illegitimate.<sup>289</sup> Consequently, like the court found in *RealNetworks*, even if a product has only one feature designed to circumvent a protective measure, it will violate § 1201.<sup>290</sup> Applying these principles, the court found that "Chamberlain ha[d] demonstrated that the Model 39 transmitter ha[d] one particular setting that serve[d] only one function: to operate the Chamberlain rolling code GDO."<sup>291</sup> Consequently, the legitimate alternative uses set forth by Skylink would not save the Model 39 transmitter from summary judgment.<sup>292</sup>

The district court then moved on to the issue of whether the rolling code program was protected by a valid copyright.<sup>293</sup> In order for § 1201(a)(2) to apply there must be an underlying work protected by copyright law.<sup>294</sup> It is well established that computer programs can be copyrighted.<sup>295</sup> Also, formal registration is not required to secure copyright protection.<sup>296</sup> However, the court found a disputed issue of a material fact with respect to the status of Chamberlain's copyright because Chamberlain did not timely provide the actual program used so that Skylink would have an opportunity to challenge the propriety of the claimed copyright.<sup>297</sup>

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<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 1036–37.

<sup>290</sup> *See id.* at 1037.

<sup>291</sup> *Id.* at 1037–38.

<sup>292</sup> *Id.* at 1038.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *See* discussion *supra* Part I.B.

<sup>296</sup> *See supra* note 43.

<sup>297</sup> *Chamberlain I*, 292 F. Supp. 2d at 1038.

Skylink's third argument provided the central basis for denying Chamberlain's motion for summary judgment.<sup>298</sup> The court found a disputed issue of material fact with respect to the existence of circumvention.<sup>299</sup> The court stated: "The DMCA explains that 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*."<sup>300</sup> The court explained that to succeed under § 1201(a)(2), Chamberlain must establish that Skylink's "Model 39 transmitter provide[d] unauthorized access to Chamberlain's [Security+ GDO] software."<sup>301</sup>

Skylink argued that there existed at least a tacit authorization on the part of Chamberlain.<sup>302</sup> Specifically, Skylink argued that: (1) by virtue of ownership, the homeowner has the right to use the GDO in a manner it chooses and further enjoys implicit authorization via the ability to program the Model 39 transmitter to operate the Chamberlain GDO; and (2) the Security+ documentation did not contain any restrictions with respect to the use of remote transmitters not manufactured by Chamberlain.<sup>303</sup> The court agreed with Skylink's contention in regard to the absence of limitations included in the GDO documentation.<sup>304</sup> Moreover, the district court pointed to the historical acceptance of cross-manufacturer operability in the GDO industry.<sup>305</sup> Here, the court noted, "the homeowner has a legitimate expectation that he or she will be able to access the garage even if his transmitter is misplaced or malfunctions."<sup>306</sup> Thus, the court found a genuine issue of material fact regarding authorization.<sup>307</sup>

### *C. The District Court's Ruling on Skylink's Motion for Summary Judgment*

After the district court denied Chamberlain's motion for summary judgment, Skylink filed its own motion for summary judgment based on

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<sup>298</sup> *See id.* at 1040.

<sup>299</sup> *See id.*

<sup>300</sup> *Id.* at 1038–39 (quoting 17 U.S.C. § 1201(a)(3)(A) (2000)).

<sup>301</sup> *Id.* at 1039.

<sup>302</sup> *Id.*

<sup>303</sup> *See id.*

<sup>304</sup> *Id.* at 1039–40.

<sup>305</sup> *Id.* at 1040.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

the same DMCA claim.<sup>308</sup> In this second motion for summary judgment, the court considered solely the issue of authorization.<sup>309</sup>

Chamberlain bolstered its contention that it never authorized its consumers to circumvent its rolling code feature by offering its webpage and operating manual that only listed Chamberlain products as compatible devices.<sup>310</sup> Furthermore, Chamberlain argued that authorization was impliedly denied by the language of the warranty, which denied coverage upon the use of non-Chamberlain products with the Security+ GDO.<sup>311</sup> Finally, Chamberlain explained the absence of an explicit prohibition with the fact that such circumventing technology was not known to exist, and therefore “it had no reason to warn its customers against using universal transmitters with its rolling code GDOs.”<sup>312</sup>

The court dismissed Chamberlain’s webpage and operating manual argument by echoing the historical acceptance of universal transmitters in the GDO industry.<sup>313</sup> With respect to Chamberlain’s warranty argument, the court stated: “Customers are not required to operate their GDOs in a manner that entitles them to coverage, . . . and instead, may choose to forgo any warranty benefits in favor of using ‘unauthorized accessories.’”<sup>314</sup> The court found that “Chamberlain’s failure to anticipate” did not defeat the consumer’s “reasonable expectation” to use alternative devices nor did it explain why Chamberlain did not make subsequent prohibitions after it discovered the Skylink Model 39 was capable of operating its Security+ GDO.<sup>315</sup>

Ultimately, the court balked at the suggestion that the DMCA is violated when the consumer operates his GDO without a Chamberlain transmitter.<sup>316</sup> Regardless of the presence or absence of authorization, the court found “consumers have a reasonable expectation that they can replace the original product with a competing, universal product without

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<sup>308</sup> Chamberlain Group, Inc. v. Skylink Techs., Inc. (*Chamberlain II*), 292 F. Supp. 2d 1040, 1041 (N.D. Ill. 2003), *aff’d*, 381 F.3d 1178 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 923 (2005).

<sup>309</sup> *See id.* at 1042.

<sup>310</sup> *Id.*

<sup>311</sup> *See id.*

<sup>312</sup> *Id.* at 1042–43.

<sup>313</sup> *Id.* at 1045.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 1044–45.

<sup>316</sup> *Id.* at 1046.

violating federal law.”<sup>317</sup> The court concluded by granting Skylink’s motion for partial summary judgment on Chamberlain’s § 1201(a)(2) claim.<sup>318</sup>

*D. The Federal Circuit Decision in Chamberlain Group, Inc. v. Skylink Technologies, Inc.*

In August 2004, the Federal Circuit heard Chamberlain’s appeal from the second ruling of the district court.<sup>319</sup> After a lengthy analysis regarding jurisdiction, the court found that the matter was properly before it based upon clearly defined precedent and 28 U.S.C. § 1295(a)(1).<sup>320</sup> The case was a matter of first impression in the Federal Circuit,<sup>321</sup> which is a prominent authority on intellectual property issues,<sup>322</sup> and only the second appellate court to interpret § 1201(a).<sup>323</sup>

*I. Issues*

Two issues were expressly raised on appeal: burden of proof and authorization.<sup>324</sup> Chamberlain set forth that the court erred when it assigned the burden of proof with respect to authorization.<sup>325</sup> In the court below, Chamberlain had the burden of establishing that Skylink and owners of the Security+ GDO did not have authorization to bypass its rolling code protective measure.<sup>326</sup> According to Chamberlain, had Skylink carried the burden of proof, it would not have been able to establish that access was authorized.<sup>327</sup>

Furthermore, in Chamberlain’s view, the court erred by ignoring the “plain language” of the statute.<sup>328</sup> In this sense, Skylink’s marketing of its

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<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1181 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 923 (2005).

<sup>320</sup> *Id.* at 1188–90.

<sup>321</sup> *Id.* at 1191.

<sup>322</sup> See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164 § 125(c), 96 Stat. 25, 36 (codified as amended at 28 U.S.C. § 1292(c)) (“The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction . . . of an appeal from a judgment in a civil action for patent infringement . . .”).

<sup>323</sup> *Chamberlain*, 381 F.3d at 1185.

<sup>324</sup> *Id.* at 1186–87.

<sup>325</sup> *Id.* at 1191.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

Model 39 transmitter was a prima facie violation of § 1201(a)(2), which went undisputed by Skylink outside of its disputed “authorization defense.”<sup>329</sup> Chamberlain’s position was based upon:

[First], that Skylink “primarily designed or produced [the Model 39] for the purpose of circumventing [Chamberlain’s rolling code] technological measure that effectively controls access to [Chamberlain’s copyrighted computer programs],” contravening § 1201(a)(2)(A); second, that the Model 39 “has only limited commercially significant purpose or use other than to circumvent [Chamberlain’s rolling code] technological measure that effectively controls access to [Chamberlain’s copyrighted computer programs],” contravening § 1201(a)(2)(B); and third, that Skylink marketed the Model 39 “for use in circumventing [Chamberlain’s rolling code] technological measure that effectively controls access to [Chamberlain’s copyrighted computer programs],”<sup>330</sup> contravening § 1201(a)(2)(C).<sup>331</sup>

On the other side, the court summed up Skylink’s ultimate position when it said, “Chamberlain GDO consumers who purchase a Skylink transmitter have Chamberlain’s implicit permission to purchase and to use any brand of transmitter that will open their GDO.”<sup>332</sup>

The court not only considered the issues raised by the parties, but also went on to answer the issue of how far Congress went to rebalance the interests of copyright owners and the public.<sup>333</sup> In order to make this determination, the court necessarily considered the legislative history of the Act and the public policy it embodied.<sup>334</sup> The crux of the court’s

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<sup>329</sup> *Id.*

<sup>330</sup> Unlike *Chamberlain I*, the appellate court here assumed for the purposes of appeal that the programs were protected by copyright law. *Id.* at 1185 n.4.

<sup>331</sup> *Id.* at 1186 (alterations in original).

<sup>332</sup> *Id.* at 1187.

<sup>333</sup> *See id.* (“To resolve this dispute, we must . . . construe the relevant portions of the DMCA, and then apply the statute, properly construed, to the specific facts at issue.”); *see also id.* at 1196 (“The crux of the present dispute over statutory construction therefore stems from a dispute over the precise balance between copyright owners and users that Congress captured in the DMCA’s language.”).

<sup>334</sup> *See id.* at 1192 (“[I]nvestigations of the statute’s structure and of relevant legislative history can both provide useful insights to help us construe the statute in the way most

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response centered on whether § 1201(a) created a new property right<sup>335</sup> as opposed to an additional means of protecting existing rights afforded by the Act.<sup>336</sup>

## 2. *Holdings*

### a. *Authorization*

As a threshold matter, the court clarified that the plaintiff in a § 1201(a) claim bears the burden of proving unauthorized access.<sup>337</sup> The court recognized the essential role authorization plays in a claim brought under § 1201(a).<sup>338</sup> Ultimately, a user authorized to access a work escapes liability under § 1201(a).<sup>339</sup> The court did not reconsider Chamberlain's implied restriction argument and clearly stated that Chamberlain did not employ any contractual restriction that would make the use of a universal remote unauthorized.<sup>340</sup> In fact, the court expressly left open the issue of whether such a contractual prohibition would be a valid mechanism for limiting an otherwise permissible use of a product under copyright law.<sup>341</sup> Instead the court disposed of the authorization issue by stating that "[c]onsumers who purchase a product containing a copy of embedded software have the inherent legal right to use that copy of the software."<sup>342</sup>

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consistent with congressional intent.").

<sup>335</sup> As one author explained:

Under [the property rights] model, copyright law defines a basic property entitlement. It sets forth the subject matter covered by copyright (whether a limited list of certain types of works, or more broadly, all writings). It details the basic requirements for protection (whether registration, publication, or fixation). It sets forth the exclusive rights given to copyright owners (whether merely to prevent copying, or also public performances and creation of derivative works), and it sets forth the penalties for violation of these rights.

Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 100 (2004).

<sup>336</sup> See *Chamberlain*, 381 F.3d at 1192–94.

<sup>337</sup> *Id.* at 1193 ("The plain language of the statute . . . requires a plaintiff alleging circumvention (or trafficking) to prove that the defendant's access was unauthorized—a significant burden where, as here, the copyright laws authorize consumers to use the copy of Chamberlain's software embedded in the GDOs that they purchased.").

<sup>338</sup> *Id.* at 1202; see S. REP. NO. 105-190, at 28 (1998).

<sup>339</sup> See *Chamberlain*, 381 F.3d at 1202.

<sup>340</sup> See *id.* at 1202 n.17.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at 1202; see also *id.* at 1187 (noting the district court's finding that  
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The court noted that this right, granted by the copyright law,<sup>343</sup> is one that cannot be revoked by Chamberlain's proposed construction of § 1201(a), as it would directly conflict with § 1201(c)(1), which preserved the rights granted to the public.<sup>344</sup> The court explained that Chamberlain's proposed construction "would go far beyond the idea that the DMCA allows copyright owner[s] to prohibit 'fair uses . . . as well as foul.'"<sup>345</sup>

*b. Property Right vs. Basis for Liability*

The court put § 1201(a) of the DMCA into perspective by establishing that the anti-circumvention rules create a new basis for liability, not a new property right.<sup>346</sup> Thus, § 1201(a) actions lie on the premise that one or more exclusive rights were infringed.<sup>347</sup> Also, the court noted that the act of "circumvention is not infringement."<sup>348</sup> Taken together, under § 1201(a), the copyright owner does not have a cause of action solely on the occurrence of circumvention; rather, they merely have a new basis for liability in connection with an underlying claim for infringement of their property right. The court made evident that had the DMCA bestowed a new property right upon the copyright holder, as Chamberlain's construction would seem to suggest, a manufacturer would be given carte blanche authority to restrict every conceivable use, including those protected by virtue of antitrust, copyright misuse, and unfair competition laws.<sup>349</sup>

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"Chamberlain's unconditioned sale implied authorization").

<sup>343</sup> The court's description of an "inherent right" to use the copyrighted work is supported by the structure of the copyright regime, which expressly grants rights to the copyright holder, 17 U.S.C. § 106 (2000), and impliedly grants those rights not reserved to the public or licensee. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447 (1984) ("[U]se of the copyright is not an infringement unless it conflicts with one of the specific exclusive rights conferred by the copyright statute.").

<sup>344</sup> *Chamberlain*, 381 F.3d at 1202. Section 1201(c) provides "Other Rights, Etc., Not Affected. — (1) Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title."

<sup>345</sup> *Id.* at 1202 (quoting *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 304 (S.D.N.Y. 2000), *aff'd sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001)).

<sup>346</sup> *Id.* at 1192.

<sup>347</sup> *See id.* at 1195 ("Statutory structure and legislative history both make it clear that § 1201 applies only to circumventions reasonably related to protected rights.").

<sup>348</sup> *Id.* at 1192 (citing § 1201(c)(1)).

<sup>349</sup> *Chamberlain*, 381 F.3d at 1193, 1202–03.

*c. Consumer Expectations*

The property right versus basis of liability distinction also bears on the issue of consumer expectations. Chamberlain argued “that the DMCA overrode all pre-existing consumer expectations about the legitimate uses of products containing copyrighted” works.<sup>350</sup> Under Chamberlain’s theory, the “pre-DMCA history in the GDO industry,” including the acceptance of universal remote transmitters, is “irrelevant” because “all . . . uses of products [that circumvent] a technological measure [that] controlled access are now per se illegal under the DMCA unless the manufacturer provide[s] consumers with *explicit* authorization.”<sup>351</sup> The court explained that such a repeal was not created by the DMCA, and further stated that “the DMCA . . . *did not* ‘fundamentally alter’ the legal landscape governing the reasonable expectations of *consumers or competitors*.”<sup>352</sup> That premise, the court explained, “is only plausible if the anticircumvention provisions established a new property right.”<sup>353</sup> Here, § 1201(a)(2) only provides an additional mechanism to protect an existing property right.<sup>354</sup>

*d. Reasonable Relationship Requirement*

Recall that Chamberlain did not set forth any allegations of copyright infringement in its suit against Skylink.<sup>355</sup> Thus, the court characterized Chamberlain’s position as one that “urges [the court] to read the DMCA as if Congress simply created a new protection for copyrighted works without any reference at all either to the protections that copyright owners already possess or to the rights that the Copyright Act grants to the public.”<sup>356</sup> The court concluded that Chamberlain’s proposed application of § 1201(a)(2) would lead to anomalistic results,<sup>357</sup> results “so bizarre that Congress could not have intended it.”<sup>358</sup>

To this end, the court noted that the enactment of the DMCA did not “rescind[] the basic bargain granting the public noninfringing and fair uses

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<sup>350</sup> *Id.* at 1193.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at 1194 (second emphasis added).

<sup>353</sup> *Id.* at 1193.

<sup>354</sup> *Id.* at 1193–94.

<sup>355</sup> *Id.* at 1197.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* at 1202.

<sup>358</sup> *Id.* (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994)).

of copyrighted materials, § 1201(c), nor prohibit[] various beneficial uses of circumvention technology.”<sup>359</sup> In rejecting Chamberlain’s construction, the court held that “§ 1201 prohibits only forms of access that bear a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners.”<sup>360</sup> In this case, Skylink’s Model 39 transmitter did not infringe upon any “protected property right” granted by the Copyright Act.<sup>361</sup> In the courts view, § 1201(c) preserves the “longstanding principles of copyright law,” one of the most fundamental being the consumer’s right to use their legitimately purchased copy of the work.<sup>362</sup> “What the law authorizes, Chamberlain cannot revoke.”<sup>363</sup>

### 3. Rationales

In developing the underlying rationales of its opinion, the court reached to the legislative history of the DMCA, traditional copyright doctrines, and prior cases that construed § 1201(a).

#### a. Legislative History

In reaching its conclusions, the court surveyed the structure and legislative history of the DMCA, as it had to, to defeat the result that would occur from a plain reading of the statute’s text.<sup>364</sup> At the onset, the court noted, “The crux of the present dispute over statutory construction . . . stems from a dispute over the precise balance between copyright owners and users that Congress captured in the DMCA’s language.”<sup>365</sup> The court then conceded that “[t]he DMCA rebalanced . . . interests to favor the copyright owner . . . [by] creat[ing] circumvention liability for ‘digital trespass.’”<sup>366</sup> However, it cautioned that the traditional notion of balance that was thoroughly expressed in the legislative history of the DMCA was clearly meant to be preserved in § 1201.<sup>367</sup> Thus, the

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<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

<sup>361</sup> *Id.* at 1203.

<sup>362</sup> *Id.*

<sup>363</sup> *Id.* at 1202.

<sup>364</sup> *See id.* at 1191 n.8 (noting Amicus Consumers Union’s suggestion that “Chamberlains [sic] proposed construction of the DMCA would enable copyright owners to engage in a number of practices that would otherwise be considered copyright misuse, an antitrust violation, or a violation of state unfair competition laws”).

<sup>365</sup> *Id.* at 1196.

<sup>366</sup> *Id.*

<sup>367</sup> *Id.* Section 1201 “fully respects and extends into the digital environment the bedrock principle of ‘balance’ in American intellectual property law for the benefit of both

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court balanced the copyright owner's essential need for protection in the digital world against the public interest in information, advancement, and competition.<sup>368</sup> This balancing yielded a "fact-specific rule of reason" that empowered the court to "construe the anticircumvention provisions in ways that [preserve] longstanding principles of copyright law."<sup>369</sup>

*b. Prior Case Law*

In a second step in avoiding Chamberlain's plain reading approach, the court distinguished the present dispute from previous cases that have applied § 1201(a)(2).<sup>370</sup> It distinguished *Reimerdes* on its facts.<sup>371</sup> Unlike in *Chamberlain*, where Skylink's Model 39 transmitter circumvented a technological measure only to access the copyrighted work, the circumvention in *Reimerdes* was found to enable copying, which infringed upon the property rights granted to the movie studios by virtue of their copyright.<sup>372</sup> Quite simply, the court noted that Chamberlain's construction confused (1) the legitimate with the illegitimate and (2) the notion of a property right with the notion of an additional basis of liability for protecting a granted property right.<sup>373</sup>

The court continued its analysis by comparing the rulings of three cases that preceded its consideration of § 1201(a)(2).<sup>374</sup> As noted above, the courts in *Lexmark*, *Gamemasters*, and *Streambox* all enjoined the circumventing technology at issue.<sup>375</sup> However, the court summarily dismissed their application to the present facts as not on point.<sup>376</sup> In the court's view, each previous circumstance involved a "protected right" that was subject to infringement.<sup>377</sup>

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copyright owners and users." *Id.* (quoting H.R. REP. NO. 105-551, pt. 2, at 26 (1998)).

<sup>368</sup> *See id.* at 1196–97.

<sup>369</sup> *Id.* at 1203.

<sup>370</sup> *See id.* at 1197–99.

<sup>371</sup> *Id.* at 1198.

<sup>372</sup> *Id.* Note that in an effort to distinguish the cases, the court seems to conflate Universal's claim with what the *Reimerdes* court concluded was the ultimate purpose behind the DeCSS code. *See id.* The defendants in *Reimerdes* were not sued for copyright infringement. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 322 (S.D.N.Y. 2000), *aff'd sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

<sup>373</sup> *Chamberlain*, 381 F.3d at 1198.

<sup>374</sup> *Id.*

<sup>375</sup> *See supra* Part I.E.1, 2, 5.

<sup>376</sup> *Chamberlain*, 381 F.3d at 1198.

<sup>377</sup> *Id.* at 1199.

## III. ANALYSIS

In shifting the balance back to a more moderate position, the court held that the anti-circumvention provisions prevent those technologies and uses that would otherwise be prohibited under the Act.<sup>378</sup> This holding looks past the plain meaning of the statute<sup>379</sup> and embraces a view that supports public access and the essential balance upon which copyright law is based.<sup>380</sup> Moreover, the court cured the “inherent conflict” that arose from the incompatible provisions that the DMCA injected into the Copyright Act,<sup>381</sup> and provided a basis that will curb many of the unintended consequences produced by the DMCA.<sup>382</sup>

*A. The Court’s Interpretation of § 1201*

The court changed the contours of the DMCA when it established that the anti-circumvention provisions did not create a new property right, but only a new basis of liability.<sup>383</sup> Such a perspective is an abrupt change

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<sup>378</sup> *Id.* at 1202 (“We conclude that 17 U.S.C. § 1201 prohibits only forms of access that bear a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners.”).

<sup>379</sup> The text of § 1201(a)(2) makes no reference to an infringement requirement. *See supra* note 81.

<sup>380</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“[P]rivate motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. . . . When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.”); *see supra* Part I.A–B (discussing the traditional notions of protection and public access).

<sup>381</sup> *See* Landau, *supra* note 69, at 288.

<sup>382</sup> For a complete discussion of the unintended consequences resulting from § 1201, *see generally* ELECTRONIC FRONTIER FOUNDATION, UNINTENDED CONSEQUENCES: FIVE YEARS UNDER THE DMCA (2003), [http://www.eff.org/IP/DMCA/unintended\\_consequences.pdf](http://www.eff.org/IP/DMCA/unintended_consequences.pdf).

<sup>383</sup> The court stated: “The DMCA does not create a new property right for copyright owners. Nor, for that matter, does it divest the public of the property rights that the Copyright Act has long granted to the public. The anticircumvention and anti-trafficking provisions of the DMCA create new grounds of liability.” *Chamberlain*, 381 F.3d at 1204. This is a distinct change from earlier analysis of § 1201. *See* 144 CONG. REC. H7074, H7094 (daily ed. Aug. 4, 1998) (statement of Rep. Biley) (“Let us make no mistake . . . about the tremendously powerful new right to control access to information that we are granting to information owners for the very first time.”); Landau, *supra* note 69, at 293; *supra* Part I.E (discussing prior cases).

from earlier decisions that largely favored the copyright holder by construing § 1201 as a basis for an independent cause of action.<sup>384</sup>

### *I. Contrasting Precedent*

Distinguishing the trend of strict interpretation used in previous decisions was a formidable obstacle in achieving the necessary principles developed by the court. The court even conceded that Chamberlain's construction was plausible under a plain reading of § 1201 and supported by the court in *Corley*.<sup>385</sup>

Regardless of the plausibility of Chamberlain's construction, the court diverged from early interpretations by distinguishing the facts of the previous controversies by seemingly reaching to an underlying infringement. Aside from the *Lexmark* decision, however, the distinction between the prior cases and the facts under consideration may not be as clear as the court suggested.<sup>386</sup>

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<sup>384</sup> *Lexmark Int'l, Inc. v. Static Control Components*, 253 F. Supp. 2d 943, 969 (E.D. Ky. 2003) ("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 copyright rights such as reproduction and distribution."), *vacated*, 387 F.3d 522 (6th Cir. 2004); Landau, *supra* note 69, at 277; *see supra* Part I.E. (discussing prior cases construing § 1201(a)(2)).

<sup>385</sup> The seeming plausibility [of Chamberlain's construction] arises because the statute's structure could be seen to suggest that § 1201(b) strengthens a copyright owner's abilities to protect its recognized *rights*, while § 1201(a) strengthens a copyright owner's abilities to protect *access* to its work without regard to the legitimacy (or illegitimacy) of the actions that the accused access enables. Such an interpretation is consistent with the Second Circuit's description: "[T]he focus of subsection 1201(a)(2) is circumvention of technologies designed to *prevent access* to a work, and the focus of subsection 1201(b)(1) is circumvention of technologies designed to *permit access* to a work but *prevent copying* of the work or some other act that infringes a copyright."

*Chamberlain*, 381 F.3d at 1199 (quoting *Universal City Studios v. Corley*, 273 F.3d 429, 441 (2d Cir. 2001)).

<sup>386</sup> *Id.* at 1198–99 ("In three other cases, *Lexmark International, Inc. v. Static Control Components, Inc.*, *Sony Computer Entertainment America, Inc. v. Gamemasters*, and *RealNetworks*, the trial courts did grant preliminary injunctions under the DMCA using language supportive of Chamberlain's proposed construction. None of these cases, however, is on point [because the circumvention was intertwined with a protect right that was being infringed].") (citations omitted)).

Recall that the court in *GameMasters* said that “[a] consumer’s choice to play the non-territorial game cannot be the infringing activity,”<sup>387</sup> yet still held the marketing of the Game Enhancer violative of § 1201(a)(2).<sup>388</sup> In that case it was true that Sony alleged copyright infringement, but the court found that Sony was not likely to succeed on that claim as a matter of law.<sup>389</sup> Furthermore, in *RealNetworks*, the plaintiff, RealNetworks, did not allege infringement, but relied upon § 1201 as its sole basis in bringing suit with respect to Streambox’s VCR and Ripper.<sup>390</sup> There, the only discussion of infringement concerned the Streambox Ferret, which was a separate issue from the VCR, Ripper, and § 1201.<sup>391</sup> Admittedly, the concept of infringement lingered in the background discussion of the CopySwitch circumvention, but that facet of the claim fell under § 1201(b)(1) and not § 1201(a)(2),<sup>392</sup> the latter being the only section at issue in *Chamberlain*. Ultimately, the *RealNetworks* court ruled in favor of the copyright holder even in the absence of an infringement claim.<sup>393</sup> The same relationship held true in *Reimerdes*,<sup>394</sup> which was later affirmed by the Second Circuit. The court in *Reimerdes* declared that even noninfringing uses could give rise to liability if the activity circumvented a protective measure as defined by the Act.<sup>395</sup>

Thus, it is clear that the previous courts that have construed § 1201(a)(2) differ from the Federal Circuit’s view that mandates a reasonable relationship between circumvention and infringement; rather, previous cases have been willing to give copyright holders a broad power

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<sup>387</sup> *Sony Computer Entm’t Am., Inc. v. GameMasters*, 87 F. Supp. 2d 976, 986 (N.D. Cal. 1999).

<sup>388</sup> *Id.* at 988.

<sup>389</sup> *Id.* at 987.

<sup>390</sup> *RealNetworks, Inc. v. Streambox, Inc.*, No. C99-2070P, 2000 U.S. Dist. LEXIS 1889, at \*5 (W.D. Wash. Jan. 18, 2000) (“RealNetworks’ claims against the Streambox VCR and the Ripper, by contrast, arise under section 1201 of the DMCA, and thus do not constitute copyright ‘infringement’ claims.”).

<sup>391</sup> *Id.* at \*8.

<sup>392</sup> *See id.* at \*5.

<sup>393</sup> *Id.* at \*8–\*9.

<sup>394</sup> *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 322 (S.D.N.Y. 2000), *aff’d sub nom.* *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (“Defendants, however, are not here sued for copyright infringement. They are sued for offering and providing technology designed to circumvent technological measures that control access to copyrighted works and otherwise violating Section 1201(a)(2) of the Act.”).

<sup>395</sup> *See id.* at 319.

to enjoin circumventing activity irrespective of infringement. This is not to say that the plaintiffs in *GameMasters*, *RealNetworks*, and *Reimerdes* would be unable to succeed under the *Chamberlain* framework, but it does demonstrate an additional hurdle that needs to be cleared in bringing a § 1201(a)(2) claim and exposes what may be at times a tenuous distinction used to distinguish prior cases.

In any event, the court cleared the way for a required nexus that is supported by public policy and the heritage of copyright law. In so doing, the court set forth a set of guidelines that will guide future courts in deciding claims that arise under § 1201(a)(2).

## 2. Supporting Policy Considerations

In the first of “a number of irreconcilable problems” that would result from Chamberlain’s proposed construction, the court detailed two regimes of copyright that would develop from a strict application.<sup>396</sup> The first regime, one envisioned by Congress, would grant copyright owners only with the rights delimited in § 106 of the Copyright Act.<sup>397</sup> Further, “[o]wners . . . who incorporate technological measures to protect those rights from technological encroachment [would] gain the additional ability to hold traffickers in circumvention devices liable under § 1201(b) . . . by enabling circumventors who use th[ose] devices to infringe.”<sup>398</sup> Beyond this, the court reasoned that Chamberlain’s construction of § 1201(a) would spur a second regime, one not necessarily envisioned by Congress, where

the owners of a work protected by *both* copyright *and* a technological measure that effectively controls access to that work per § 1201(a) would possess *unlimited* rights to hold circumventors liable under § 1201(a) *merely for accessing that work*, even if that access enabled *only* rights that the Copyright Act grants to the public.<sup>399</sup>

In the court’s view, this second regime is unacceptable on two levels. On a fundamental level, such a regime that effectively allows “copyright owners to deny all access to the public” would enter into the realm of the irrational and therefore fail as a rational exercise of legislative authority,

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<sup>396</sup> *Chamberlain Group, Inc. v. Skylink Techs.*, 381 F.3d 1178, 1199–1200 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 923 (2005).

<sup>397</sup> *Id.* at 1199.

<sup>398</sup> *Id.* at 1199–1200.

<sup>399</sup> *Id.* at 1200.

something that Congress is not empowered to do.<sup>400</sup> Secondly, the court was unwilling to engage in a construction that would result in two diametrically opposed provisions that reside in the same act.<sup>401</sup> Here, the second regime would “flatly contradict § 1201(c)(1),” which provides “nothing in this section shall affect rights, remedies, limitations, or defenses . . . under this title,”<sup>402</sup> namely the consumer’s inherent right to use the copy of the work purchased.<sup>403</sup>

A second consequence of a plain-reading approach would be repugnant to the deeply revered notion of competition.<sup>404</sup> In this sense, Chamberlain’s “construction would allow any manufacturer of any product to add a single copyrighted sentence or software fragment to its product, wrap the copyrighted material in a trivial ‘encryption’ scheme, and thereby gain the right to restrict consumers’ rights to use its products in conjunction with competing products.”<sup>405</sup> The court noted that even if such a construction was accepted and § 1201 was deemed to create a new property right, such a provision would necessarily create “an exemption from copyright misuse and antitrust liability”—a “privilege” Federal Circuit precedent clearly refutes.<sup>406</sup>

The court exposed a third quagmire by way of illustration. The court noted that under Chamberlain’s plain language proposal, “disabling a burglar alarm to gain ‘access’ to a home containing copyrighted books, music, art, and periodicals would violate the DMCA.”<sup>407</sup> Taken to its logical conclusion this simplified scenario would fall within a literal operation of § 1201(a) because a technological measure (the burglar alarm) that effectively controls access (guards admission to the home) to a work (the books, music, art and periodicals) would be circumvented. This oversimplified hypothetical may be imperfect as it relates to the Act, but is logically correct and exemplifies the need for revision, which is supplied by the court’s reformulation of § 1201(a)(2).

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<sup>400</sup> *Id.* According to *Eldred v. Ashcroft*, 537 U.S. 186, 205 n.10 (2003), “Congress’ exercise of its Copyright Clause authority must be rational.”

<sup>401</sup> *Chamberlain*, 381 F.3d at 1200.

<sup>402</sup> *Id.* (quoting 17 U.S.C. § 1201(c)(1) (2000)).

<sup>403</sup> *Id.* at 1203.

<sup>404</sup> *Id.* at 1201.

<sup>405</sup> *Id.*

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

### 3. *Guidelines Provided*

The court's opinion sets forth a seemingly clear test that a plaintiff must satisfy to establish a prima face case under § 1201(a)(2):

A plaintiff alleging a violation of § 1201(a)(2) must prove: (1) ownership of a valid *copyright* on a work, (2) effectively controlled by a *technological measure*, which has been circumvented, (3) that third parties can now *access* (4) *without authorization, in a manner that* (5) *infringes or facilitates infringing a right protected by the Copyright Act*, because of a product that (6) the defendant either (i) *designed or produced* primarily for circumvention; (ii) made available despite only *limited commercial significance* other than circumvention; or (iii) *marketed* for use in circumvention of the controlling technological measure.<sup>408</sup>

In its reformulation cited above, the court expressly injected a “reasonable relationship” requirement into the text of § 1201(a)(2) where the circumvention must have a nexus with a violation of a right afforded to the owner by the Copyright Act.<sup>409</sup> However, any clarity soon dissipates when the newfound “reasonable relationship” requirement is explored much further. The contours of this reasonable relationship are not well defined in terms of scope or degree and will have to be developed by future courts that construe § 1201(a)(2).<sup>410</sup> To this end, the court further provided that “courts must decide where the balance between the rights of copyright owners and those of the broad public tilts subject to a fact-specific rule of reason.”<sup>411</sup>

### B. *Strengths and Weaknesses of the Opinion*

A literal application of § 1201(a)(2) does not mandate that a cause of action be predicated on some form of copyright infringement traditionally protected against by the Copyright Act.<sup>412</sup> In fact, prior to the

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<sup>408</sup> *Id.* at 1203 (emphasis added).

<sup>409</sup> *Id.*

<sup>410</sup> This void was explicated by Michael Madison, professor of law at the University of Pittsburgh, in a panel discussion discussing the *Chamberlain v. Skylink* opinion. See Law and IT, *supra* note 79 (discussing the *Chamberlain* decision).

<sup>411</sup> *Chamberlain*, 381 F.3d at 1203.

<sup>412</sup> The legislative history suggests a plain application of the three part test in determining liability under § 1201(a)(2):

(continued)

*Chamberlain* decision, it was thought that § 1201(a) created a new independent cause of action.<sup>413</sup> As the court pointedly demonstrated, such a reading would rebalance the traditional compromise in copyright law in a way that would vest the copyright owner with an unbridled power to control not only how the consumer uses the product, but also the functionality of aftermarket devices and interoperability of alternative products the consumer elects to use.<sup>414</sup> Such a notion would be repugnant to the fundamental balance of protection and access embedded in copyright law<sup>415</sup> and would enter the realm of anti-competitive practices.<sup>416</sup> Beyond its equitable result, the greatest strength of the opinion is its underlying

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For a technology . . . to be prohibited under this subsection, one of three conditions must be met. It must: (1) be primarily designed . . . for the purpose of circumventing; (2) have . . . limited commercially significant . . . use other than to circumvent; or (3) be marketed by the person who . . . traffics in it . . . for use in circumventing . . . .

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

<sup>413</sup> 144 CONG. REC. H7074, H7094 (daily ed. Aug. 4, 1998) (statement of Rep. Bliley) (“Let us make no mistake . . . about the tremendously powerful new right to control access to information that we are granting to information owners for the very first time.”); Landau, *supra* note 69, at 277; Liu *supra* note 335, at 123 (“The DMCA can be viewed as creating an additional property entitlement against circumvention.”).

<sup>414</sup> *Chamberlain*, 381 F.3d at 1201. Such controversial results have been cataloged since the DMCA’s inception. See, for example, Chillingeffects.org’s catalog of developments, which comments on and archives DMCA claims and their effect on traditional copyright values of public access and intellectual development. Chilling Effects, Anticircumvention (DMCA), <http://www.chillingeffects.org/anticircumvention/> (last visited Mar. 11, 2006).

<sup>415</sup> Congress noted that:

[N]ew protections are needed due to the ease with which flawless copies of copyrighted materials can both be made and transmitted in the digital network environment. Essential, however, to the creation of new guarantees for copyright owners is the retention of the traditional rights of the users of intellectual property. A balance has always existed in our law between these conflicting interests, and the major challenge in the writing of this legislation is to assure that no fundamental altering of that delicate balance takes place.

144 CONG. REC. H7074, H7096 (daily ed. Aug. 4, 1998) (statement of Rep. Boucher).

<sup>416</sup> Sherman Antitrust Act § 1, 15 U.S.C. § 1 (2000) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”).

concept that preserves the traditions of copyright law while maintaining a degree of protection that the digital world demands. The opinion, though, has flaws.

### 1. *Rule of Reason*

The greatest strength of the opinion is provided by the court's common sense interpretation of a broken statutory provision, in its own words a "rule of reason."<sup>417</sup> In so doing, the court went to great lengths to reconcile the line of cases that construed § 1201(a) in a fashion that favored the copyright holder.<sup>418</sup> Here, the court restored the equitable balance of traditional copyright law and achieved a long overdue result<sup>419</sup> by reaching to the legislative history and public policy surrounding the Copyright Act. By clarifying the distinction between a property right and remedy, and requiring a reasonable nexus between circumvention and infringement, the court saved § 1201 from being used in a fashion inconsistent with its legislative purpose.<sup>420</sup> Such judicial intervention has been needed to allow for legitimate uses of copyrighted works.<sup>421</sup> In providing such, the opinion establishes a judicial interpretation that will foster legitimate uses in a way that the narrowly applied exemption process has failed to do.<sup>422</sup>

### 2. *Blurring Distinct Rights: the Collapse of § 1201 (a) and (b)*

The court's analysis significantly collapses the major distinction between § 1201(a)(2) and § 1201(b)(1).<sup>423</sup> Section 1201(a) and (b) "are designed to protect two distinct rights and to target two distinct classes of devices."<sup>424</sup> "[T]he focus of subsection 1201(a)(2) is circumvention of technologies designed to *prevent access* to a work, and the focus of subsection 1201(b)(1) is circumvention of technologies designed to . . . *prevent copying of the work or some other act that infringes a*

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<sup>417</sup> *Chamberlain*, 381 F.3d at 1202.

<sup>418</sup> See *supra* Part I.E.

<sup>419</sup> See Benchell, *supra* note 66, at 14.

<sup>420</sup> Liu, *supra* note 335, at 143 ("Plaintiffs . . . have sought to extend the reach of the DMCA far beyond what Congress could plausibly have intended, to apply to such diverse products as garage door openers and toner cartridges.").

<sup>421</sup> Samuelson, *supra* note 65, at 543 ("[W]hile the final version of the DMCA anti-circumvention provision responded to several significant concerns of the digital economy sector . . . section 1201 should have an 'or other legitimate purposes' exception . . .").

<sup>422</sup> See Barrett, *supra* note 79, at 15–16 ("[T]he Librarian has exempted only two very narrow classes of works . . .").

<sup>423</sup> See *supra* Part I.D.1 (discussing the distinctions and structure of § 1201).

<sup>424</sup> S. REP. NO. 105-190, at 12 (1998).

*copyright.*<sup>425</sup> In light of the Federal Circuit's interpretation, the resulting framework of the two sections is separated only by the concept of access control rather than the larger concept of infringement. By implanting a requirement of infringement in a § 1201(a)(2) claim, the court effectively transforms § 1201(a)(2) into a tool similar to § 1201(b)(1), which is only capable of protecting the copyright owner from a circumvention that is coupled with an infringement of a protected right afforded by the Copyright Act.<sup>426</sup> In essence, the court's reasoning adds the "[and] *prevent copying of the work or some other act that infringes a copyright*" language to the focus of § 1201(a)(2).

It is somewhat unclear exactly what § 1201(b)(1) protects that § 1201(a)(2) does not. The two sections no longer protect "two distinct rights" as the Senate report suggests;<sup>427</sup> rather, § 1201(a)(2) and (b)(1) both protect only against infringement that is enabled by circumvention. The only distinction that remains is the context of the circumvention: first, where access is controlled by the technological measure (§ 1201(a)(2)); and second, where access control is not a consideration but some technological measure protects the actual work, rather than access to it, from infringement (§ 1201(b)(1)). Thus, the result is nothing more than a slight distinction where both sub-sections essentially "protect the traditional copyright rights of the copyright owner."<sup>428</sup> This reading stretches the structure of the section in a way that deviates from the operation expressly described in the legislative history.<sup>429</sup>

### 3. Making Sense of the Exemptions

The *Chamberlain* decision simultaneously defies the structure of the statute while harmonizing the policy of the exceptions that protect noninfringing uses. As noted above, § 1201(a)(1) contains a rule-making

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<sup>425</sup> *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 441 (2d Cir. 2001) (citing S. REP. NO. 105-190, at 11–12) (emphasis added).

<sup>426</sup> See *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178, 1202 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 923 (2005), where the court concludes Section 1201 "prohibits only forms of access that bear a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners."

<sup>427</sup> See S. REP. NO. 105-190, at 12 (1998).

<sup>428</sup> *Id.*

<sup>429</sup> *Id.* at 29 ("Subsection (b) applies to those technological measures employed by a copyright owner that effectively protect his or her copyright rights in a work, *as opposed to* those technological protection measures covered by subsection (a), which prevent unauthorized access to a copyrighted work." (emphasis added)).

provision whereby the Library of Congress may promulgate exemptions for “noninfringing uses by persons who are users of a copyrighted work [and] are, or are likely to be, adversely affected” by § 1201(a)(1)(A).<sup>430</sup> These limited classes of works are only exempted from the prohibition in § 1201(a)(1)(A).<sup>431</sup> Beyond that, § 1201 goes further to provide many broader exemptions ranging from educational institutions to security testing.<sup>432</sup> These exemptions generally provide relief from § 1201(a) as a whole.<sup>433</sup>

If the *Chamberlain* court is correct in its conclusion that a valid claim under § 1201(a)(2) must include a reasonable relationship between circumvention and copyright infringement, then what role do these exemptions serve? The existence of the exemptions evidence the fact that § 1201(a) was meant to apply regardless of whether the use enabled by the circumvention was infringing or not.<sup>434</sup> Otherwise, there would be no need to promulgate exemptions to the general prohibition against circumvention, because a legitimate use would escape liability under § 1201(a) so long as it did not have a reasonable relationship with some type of infringement.<sup>435</sup>

Putting that underlying complication aside, the court’s conclusion is not without merit. The *Chamberlain* decision extends the policy behind the exemptions allowed under § 1201(a)(1)(B) to the operation of § 1201(a)(2), which would otherwise not be applicable. As one author noted, “the exemption [in §1201(a)(1)(B)] proves to be an empty one because while the use of decryption technology to obtain access to the exempt class of works would not violate the DMCA, manufacturing or distributing the decryption technology necessary to gain such access would still be a violation.”<sup>436</sup> The *Chamberlain* decision cures this precarious

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<sup>430</sup> 17 U.S.C. § 1201(a)(1)(D) (2000); *see supra* Part I.D.2.

<sup>431</sup> § 1201(a)(1)(B), (E).

<sup>432</sup> § 1201(d)–(j); *see supra* Part I.D.

<sup>433</sup> Section 1201(d) provides exemptions from (a)(1)(A), but not from (a)(2), or (b). Section 1201(e) provides exemptions from § 1201 as a whole. Section 1201(f) provides exemptions from (a)(1)(A), (a)(2), and (b). Section 1201(g) provides exemptions from (a)(1)(A), and (a)(2). Section 1201(h) provides exemptions from (a) upon the court’s determination. Section 1201(i) provides exemptions from (a)(1)(A). Section 1201(j) provides exemptions from (a)(1)(A), and (a)(2).

<sup>434</sup> *See Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 444 n.13 (2d Cir. 2001) (“It would be strange for Congress to open small, carefully limited windows for circumvention to permit fair use in subsection 1201(d) if it then meant to exempt in subsection 1201(c)(1) *any* circumvention necessary for fair use.”).

<sup>435</sup> *See id.*

<sup>436</sup> Barrett, *supra* note 79, at 15–16.

construct by allowing the trafficking in of those devices that do not enable copyright infringement and provide for legitimate uses, thereby conforming § 1201(a)(2) with the essence of the § 1201(a)(1)(B) exceptions. Absent *Chamberlain*, the trafficking in of devices otherwise permissible under the Copyright Act would be prohibited.<sup>437</sup>

#### 4. *Moving Toward a Reasonable Framework*

As demonstrated by the foregoing discussion, the court ultimately succeeds in circumscribing a statute in desperate need of revision.<sup>438</sup> Ultimately, the decision crafts a solution, as imperfect as it may be, that brings meaning back to the concept of copyright.<sup>439</sup> As one author put it: “Copyright signifies a system of protection designed and intended primarily to serve the public interest in the creation and dissemination of creative works, rather than the private interest of enriching those who create and disseminate such works.”<sup>440</sup> The court’s formulation will provide a more workable approach to the evolving needs of both innovation and access.

#### C. *Foreseeable Consequences and Likely Responses*

The *Chamberlain* decision will likely create more issues than it settles. Surely, the debate over the DMCA will continue in the courts and on the legislative floor.<sup>441</sup> The conclusion of the court has merit because it limits the broad reach of the DMCA,<sup>442</sup> but it also creates some divergence in the interpretation of § 1201(a).<sup>443</sup> Ultimately, the issues must be resolved by a congressional action that provides a consistent and reasonable approach in dealing with new technologies.<sup>444</sup> Until such time, the respective parties

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<sup>437</sup> *Id.*; Nimmer, *supra* note 71, at 735 & n.334.

<sup>438</sup> For a discussion elaborating on the need for revision, see generally Samuelson, *supra* note 65.

<sup>439</sup> See 144 CONG. REC. H7074, H7099 (daily ed. Aug. 4, 1998) (statement of Rep. Berman) (“In the context of trying to protect this property, we needed to come to reasonable balances with providers of these services, with people who have legitimate interests in the fair use.”).

<sup>440</sup> Lunney, *supra* note 79, at 814.

<sup>441</sup> Randy Barrett, *Content Owners, Fair Use Advocates Prep for New Copyright Fight*, COMM. DAILY, Jan. 12, 2005, at 7.

<sup>442</sup> See *supra* Part III.A.2 (discussing the court’s consideration of *Chamberlain*’s broad construction of § 1201).

<sup>443</sup> Compare *supra* Parts I.E (discussing prior cases), with II.D (discussing the *Chamberlain* decision).

<sup>444</sup> For a discussion advocating congressional revision, see Pamela Samuelson, *Towards* (continued)

will pursue both sides of the copyright balance and forge the future of copyright law through lobbying efforts, the judicial process, and private contract.

*1. Content Providers—Lobbying for Stiffer Laws*

Generally, internet service providers (ISPs) are not liable for copyright infringement committed by their users.<sup>445</sup> However, ISPs do have a limited duty to pursue complaints that stem from an alleged infringement, which requires them to remove the material if the user cannot demonstrate authorized use.<sup>446</sup> This duty may expand as it seems content providers and copyright owners may have taken notice of *Chamberlain's* shift in interpretation and have sought other avenues to protect their interests.<sup>447</sup> For instance, the software and digital content industries have renewed their campaign for stiffer laws that will combat the effects of decisions like *Chamberlain*.<sup>448</sup> In this respect, if the industry cannot protect their content at the user or instrumentality level as it could before *Chamberlain*, it will attack the channels of distribution, namely ISPs.<sup>449</sup> Although it stops short of lobbying for ISP liability, it does demand a heightened duty of disclosure that more readily forces ISPs to disclose trafficking activity and names of infringing users.<sup>450</sup>

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More Sensible Anti-Circumvention Regulations 6, available at <http://www.sims.berkeley.edu/~pam/papers/fincrypt2.pdf> (“Congress should have added a general purpose ‘or other legitimate purposes’ exception provision to section 1201 to deal with . . . legitimate circumventions.”) (unpublished manuscript); Samuelson, *supra* note 65, at 546–62; and Law and IT Webcast, *supra* note 79.

<sup>445</sup> 17 U.S.C. § 512(a) (2000); KEVIN P. CRONIN & RONALD N. WEIKERS, DATA SECURITY AND PRIVACY LAW: COMBATING CYBERTREATS § 10:11, at 10-24 (Supp. 2005). For a complete discussion of ISP liability, see Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1838 (2000) (advocating an interpretation of copyright law that “balances society’s interests in preventing copyright infringement and free speech”).

<sup>446</sup> § 512(b); CRONIN & WEIKERS, *supra* note 445, § 10:11, at 10-24 to 10-25.

<sup>447</sup> AEI-Brookings Joint Center, Software Makers Lobby for Copyright Changes, <http://www.aei-brookings.org/dailyreport/archives/016818.php> (last visited Mar. 12, 2006) (reporting Business Software Alliance lobbies for tougher copyright protection and ISP obligation to give names of infringers).

<sup>448</sup> *Id.*

<sup>449</sup> *See id.*

<sup>450</sup> *Id.*

## 2. *Acceptance of Chamberlain v. Skylink in Other Circuits*

Shortly after the decision of *Chamberlain v. Skylink*, the Sixth Circuit took the opportunity to hear an appeal from *Lexmark International, Inc. v. Static Control Components, Inc.*<sup>451</sup> Again, Lexmark claimed that Static Control's microchip circumvented technological measures used in connection with Lexmark printers.<sup>452</sup> The court overturned the district court's determination that Lexmark would likely succeed on their DMCA claims.<sup>453</sup> Although the Sixth Circuit disposed of Lexmark's DMCA claims without reaching the principles set forth in *Chamberlain*, it is evident that the court applied the same "rule of reason" to avoid the harsh results expounded upon by the Federal Circuit.<sup>454</sup>

In the opinion, Judge Sutton disposed of the § 1201(a) claims by denying applicability of the DMCA.<sup>455</sup> In sum, the court concluded that "[i]t is not Lexmark's authentication sequence that 'controls access'" to the programs, but "the purchase of a Lexmark printer."<sup>456</sup> The programs at issue were "freely" available to anyone who purchased a Lexmark printer because the code could be read directly from the printer memory.<sup>457</sup> "No security device, in other words, protects access to the [program code] and no security device accordingly must be circumvented to obtain access to that program code."<sup>458</sup> Furthermore, Judge Sutton wrote, "it does not make sense to say that this provision of the DMCA applies to otherwise-readily-accessible copyrighted works."<sup>459</sup> The court noted that "the DMCA not only requires the technological measure to 'control[] access' but also requires the measure to control that access 'effectively,' and it seems clear that this provision does not naturally extend to a technological measure that restricts one form of access but leave another route wide open."<sup>460</sup> In

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<sup>451</sup> 387 F.3d 522 (6th Cir. 2004).

<sup>452</sup> *Id.* at 529; *see supra* Part I.E.4.

<sup>453</sup> *Lexmark*, 387 F.3d at 551.

<sup>454</sup> *See id.* at 551 (Merritt, J., concurring) (rebuking attempts to use § 1201(a)(2) as a tool to stifle competition).

<sup>455</sup> *Id.* at 548, 550 (majority opinion).

<sup>456</sup> *Id.* at 546.

<sup>457</sup> *See id.* at 546–47.

<sup>458</sup> *Id.* at 547.

<sup>459</sup> *Id.*

<sup>460</sup> *Id.* at 547 (citation omitted); *cf.* *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 317 (S.D.N.Y. 2000) (noting that a protective measure does not have to be the best or most secure method to warrant protection under § 1201), *aff'd sub nom.* *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

addition to these findings, the court noted the validity of § 1201(f)'s interoperability defense.<sup>461</sup>

Lastly, in his concurrence, Judge Merritt noted that the court “should make clear that in the future companies like Lexmark cannot use the DMCA in conjunction with copyright law to create monopolies.”<sup>462</sup> Although the interpretation of § 1201 is far from settled, the Sixth Circuit's opinion continues the common-sensical approach to § 1201's broad reach.<sup>463</sup>

### 3. Legislation

Since their introduction in Congress, the Digital Media Consumers' Rights Act of 2003<sup>464</sup> (DMCRA) and the Digital Choice and Freedom Act of 2002<sup>465</sup> (DCFA) have enjoyed little congressional support.<sup>466</sup> Both acts seek to “restore the balance between the protection of the copyright owner and the rights of the users of copyrighted works.”<sup>467</sup> The *Chamberlain* decision may breathe new life into the two acts that have been stuck in committee since their introduction, or at least give their legislative purpose some practical effect.<sup>468</sup> The DMCRA and DCFA would help alleviate what the court viewed as absurdities created by the plain language of the DMCA. Relevant to this discussion, the acts would take a step in the

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<sup>461</sup> See *Lexmark*, 387 F.3d at 550–51.

<sup>462</sup> *Id.* at 551 (Merritt, J., concurring).

<sup>463</sup> Law and IT Webcast, *supra* note 79 (including comments of Jason Shultz, who discussed how *Lexmark* and *Chamberlain* provide relief from earlier interpretations of § 1201(a)(2) that have created harsh results).

<sup>464</sup> H.R. 107, 108th Cong. (2003).

<sup>465</sup> H.R. 5522, 107th Cong. (2002).

<sup>466</sup> Benchell, *supra* note 66, at 14; Digital Media Consumers' Rights Act Bill Tracking Report, 108 Bill Tracking H.R. 107, <http://www.lexis.com> (last visited Mar. 12, 2006) (listing one sponsor and twenty-three cosponsors); Digital Choice and Freedom Act Bill Tracking Report, 107 Bill Tracking H.R. 5522 *available at* LEXIS (last visited Mar. 12, 2006) (listing one sponsor and one cosponsor).

<sup>467</sup> CRONIN & WEIKERS, *supra* note 445, § 6:108.60, at 97.

<sup>468</sup> See Declan McCullagh, *The Hill's Property Rights Showdown*, CNET News, Jun. 22, 2004, [http://news.com.com/The+Hills+property+rights+showdown/2008-1025\\_3-5243241.html](http://news.com.com/The+Hills+property+rights+showdown/2008-1025_3-5243241.html) (reporting the Personal Technology Freedom Coalition consisting of major tech companies like Sun, Gateway, and Phillips, reasserted its “support for a proposal to repeal the portion of the DMCA” that is targeted by the DMCRA and including an interview with sponsor Representative Rick Boucher, who not only expects the act to be passed in the House in the next Congress, but also notes the “tremendous change in public perception with respect to the [DMCA]”).

direction of creating a needed “legitimate purposes” exception to the broad reach of § 1201.<sup>469</sup>

Among other things, the DMCRA would continue the reasoning of *Chamberlain* by amending § 1201(c)(1) to expressly allow circumvention and the trafficking in of such enabling technologies that “do[] not result in an infringement of the copyright in the work.”<sup>470</sup> Thus, absent an act of piracy or infringement, consumers will be able to access copyrighted works in a manner consistent with pre-DMCA notions of public rights, one of which the *Chamberlain* court described as an inherent right to use a legitimately obtained copy. In the same vein, the DFCA expressly seeks to “restore the traditional balance between copyright holders and society.”<sup>471</sup> In amending several provisions of the Copyright Act, the DFCA seeks to solidify traditional consumer expectations.<sup>472</sup> Like the DMCRA, the DFCA would ease the harshness of § 1201 by allowing circumvention where the user makes a non-infringing use of the work.<sup>473</sup> Notably, the DFCA would make non-negotiable license terms unenforceable “to the extent that they restrict or limit any of the limitations on exclusive rights.”<sup>474</sup>

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<sup>469</sup> Samuelson, *supra* note 65, at 546 (stating that Congress should have added “a general purpose ‘or other legitimate purposes’ [exception] provision [to] section 1201” to deal with legitimate circumventions).

<sup>470</sup> H.R. 107, 108th Cong. § 5(b)(1) (2003). This section provides:

(b) Fair Use Restoration. Section 1201(c) of title 17, United States Code, is amended – (1) in paragraph (1), by inserting before the period at the end the following: “and it is not a violation of this section to circumvent a technological measure in connection with access to, or the use of, a work if such circumvention does not result in an infringement of the copyright in the work”; and (2) by adding at the end the following new paragraph: “(5) It shall not be a violation of this title to manufacture, distribute, or make noninfringing use of a hardware or software product capable of enabling significant noninfringing use of a copyrighted work.”

*Id.* § 5(b).

<sup>471</sup> H.R. 5522, 107th Cong. § 2(9) (2002).

<sup>472</sup> *See id.* § 3; Press Release, Congresswoman Zoe Lofgren, Summary of the Digital Choice and Freedom Act of 2002, [http://www.house.gov/lofgren/news/2002/021002\\_summary.htm](http://www.house.gov/lofgren/news/2002/021002_summary.htm) (last visited Mar. 12, 2006).

<sup>473</sup> H.R. 5522 § 5 (providing an analogous provision that allows the trafficking in of circumvention devices that enable non-infringing uses).

<sup>474</sup> *Id.* § 123(b).

#### 4. *Copyright Owners*

On the other hand, copyright owners will certainly expand their agreements to include broad restrictions on how their works are used in an effort to avoid the authorization defense mounted in *Chamberlain*.<sup>475</sup> Consequently, if consumers are faced with burdening restrictions with respect to the products they purchase, one could expect a decline in customer satisfaction because the functionality of their devices will be limited.<sup>476</sup> However, this is wholly dependent upon the ability of contractual agreements to curtail such traditional rights, an issue left open by the court in *Chamberlain*<sup>477</sup> and targeted by the DFCA.<sup>478</sup>

Alternatively, but less likely, copyright holders may come to embrace some of the realities discussed in *Chamberlain*. For instance, in an effort to solidify piracy, fighting digital rights management (DRM) technologies, the major consumer electronic companies have announced their intention to develop a common protocol to allow for both anti-piracy protection and cross platform (multi-manufacturer) operability, which will allow users to play content on a variety of different players.<sup>479</sup> The promise of this news, however, is contingent upon all content providers adopting the new standards, an action not likely to happen any time soon.<sup>480</sup>

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<sup>475</sup> *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1186–87 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 923 (2005) (discussing the “authorization defense” and Chamberlain’s attempt to refute implied authorization); see Greg Sandoval, *TiVo Users Fear Recording Restrictions*, POST-GAZETTE.COM (Pittsburgh), Sept. 22, 2005, <http://www.post-gazette.com/pg/05265/575624.stm> (“TiVo quietly disclosed that it would employ copyright-protection software . . . for . . . programs[, which] allows broadcasters to restrict how long a DVR can save certain recordings or in some cases prevent someone from recording altogether.”).

<sup>476</sup> *A Fine Balance*, ECONOMIST (London), Jan. 23, 2003, at 16 (“If content industries overplay their hand, [by using highly restrictive methods] they could end up alienating and losing much of their audience.”); Sandoval, *supra* note 475.

<sup>477</sup> *Chamberlain*, 381 F.3d at 1202 n.17.

<sup>478</sup> H.R. 5522, § 123(b).

<sup>479</sup> *Major Electronics Firms Form Alliance to Fight Piracy*, XINHUA (Los Angeles), Jan. 20, 2005, available at LEXIS (reporting Sony, Panasonic, Samsung, and Phillips form alliance to allow “buyers of their products [to] watch or listen to ‘appropriately licensed video and music on any device, independent of how they originally obtained that content’”).

<sup>480</sup> See Andrew Stein, *Apple: RealNetworks Hacked iPod*, CNN MONEY.COM, July 29, 2004, [http://money.cnn.com/2004/07/29/technology/apple\\_real/](http://money.cnn.com/2004/07/29/technology/apple_real/) (discussing RealNetworks’ Harmony product “that allows users to download music from its online music store and use it on any portable music player.” and Apple’s response that “it would ‘strongly caution’ Real and its customers that . . . Harmony will stop working with ‘current and future’ iPods”

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5. *Reviving Controversies—The End of Effective Region Coding?*

Region coding, or regionalization, is a control mechanism that enables the manufacturer of a device to limit the media accessed by the device by using geographic codes.<sup>481</sup> It is most notably used with DVDs, video games, and their respective players.<sup>482</sup> Using the facts of *Sony Computer Entertainment America, Inc. v. GameMasters*,<sup>483</sup> regionalization ideally functions to allow only games sold in the United States to be played on gaming consoles sold in the United States.<sup>484</sup> Regionalization is not a technological measure that protects against copying, but rather to control the distribution markets for media.

Previous to *Chamberlain*, a device that bypassed the region coding and allowed a user to play (access) a game from a foreign region would be violative of § 1201(a).<sup>485</sup> However, under *Chamberlain*'s construction of § 1201(a), a device is only violative of the Act if it bears a reasonable relationship with infringement.<sup>486</sup> Thus, *Chamberlain*'s reasonable relationship test seems to eliminate the basis used to prevent the trafficking in of devices that circumvent region coding because those devices do not enable infringement, but rather allow access to media from multiple regions.<sup>487</sup>

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when updates are released).

<sup>481</sup> See *supra* Part I.E.1 (discussing regionalization in the context of games).

<sup>482</sup> See generally How Stuff Works, Why Can I Play Some DVD Movies, but not Others, on My Computer DVD-ROM?, <http://electronics.howstuffworks.com/question474.htm> (last visited Mar. 12, 2006).

<sup>483</sup> 87 F. Supp. 2d 976 (N.D. Cal. 1999).

<sup>484</sup> *Id.* at 981.

<sup>485</sup> See *id.* at 989–90 (enjoining GameMasters from “[a]dvertising, promoting, distributing, selling, transporting or purchasing the Game Enhancer, or any other device that permits a consumer to play or use foreign made SCEA games that could not otherwise be played on the PlayStation without the Game Enhancer device”).

<sup>486</sup> *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1202 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 923 (2005).

<sup>487</sup> This concept has been expounded by many commentators, including Ernest Miller, Cory Doctorow, and Wendy Seltzer. Law and IT Webcast, *supra* note 79 (discussing the legality of region free DVD players in light of *Chamberlain v. Skylink*); WebCast: The DMCA and IT (July 2, 2003), <http://www.itconversations.com/shows/detail18.html> [hereinafter DMCA Webcast] (discussing regionalization and the ability of the DMCA to prevent regionalization generally and in the context of DVD players).

## IV. SIGNIFICANCE

The *Chamberlain* decision relaxes the strict language of the statute and the harsh results that would follow a plain-reading application of its language.<sup>488</sup> There is no doubt that the DMCA is needed “to deal with special problems created by the so-called digital revolution.”<sup>489</sup> Equally clear is that the DMCA cannot be used as an anti-competitive tool to stifle interoperability and eliminate consumer expectations. The question that remains, and where *Chamberlain* has significance, is where these two concepts collide, as is the case in the world of digital music.

*A. Digital Music and the Struggle for Platform*

The popularity of digital media, i.e., streaming and downloadable music files, is influencing the behavior and trends of many technology companies and the markets in which they compete.<sup>490</sup> The number of songs downloaded doubled in 2004, reaching 200 million.<sup>491</sup> The International Federation of the Phonographic Industry (IFPI) reported that the number of music providers reached 230 in 2004,<sup>492</sup> while forecasts predicted industry revenues would double in 2005.<sup>493</sup>

As it stands today, there is no accepted standard or platform for digital music.<sup>494</sup> This is a sharp change from previous transitions in format, i.e., vinyl records to compact discs, where an established standard was set

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<sup>488</sup> *Chamberlain*, 381 F.3d at 1200–01 (stating that the consequences “of considering ‘access’ in a vacuum devoid of ‘protection,’” as Chamberlain suggested, would be “both absurd and disastrous”).

<sup>489</sup> *In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003).

<sup>490</sup> Adam Lashinsky, *Saving Face at Sony*, FORTUNE, Feb. 21, 2005, available at 2005 WLNR 22686141 (discussing the state of competition in the world of digital music and Sony’s intention to bolster its digital music business); Press Release, RealNetworks, Inc., RealNetworks Announces Record Revenue for 2004 (Jan. 26, 2005), available at WESTLAW, PRNEWS database (reporting that RealNetworks, inc., “the leading creator of digital media software,” announced that fourth quarter 2004 “revenue was \$72.5 million, up 34% from \$54.1 million in the fourth quarter of 2003).

<sup>491</sup> INT’L FED’N OF THE PHONOGRAPHIC INDUS., IFPI:05 DIGITAL MUSIC REPORT 3 (2005), <http://www.ifpi.org/site-content/library/digital-music-report-2005.pdf>.

<sup>492</sup> *Id.*

<sup>493</sup> Press Release, Jupitermedia, Jupiterresearch Forecasts Digital Music Sales Will Hit \$1.7 Billion in 2009, but Won’t Replace CDs (July 26, 2004), <http://www.jupitermedia.com/corporate/releases/04.07.26-newjupresearch.html>.

<sup>494</sup> Douglas S. Wood, *Your Music, Differing Formats*, CNN.COM, Aug. 19, 2004, <http://www.cnn.com/2004/TECH/ptech/08/18/file.formats/index.html>.

before the new medium was commercially available.<sup>495</sup> The race for platform acceptance is the latest “land rush” in the digital music market.<sup>496</sup> In other words, just like Microsoft vastly controls the personal computer operating system market with its Windows products, technology companies are striving to make their products the platform of choice, or adhesion based on one’s point of view, in the context of digital media.<sup>497</sup> This battle in digital music is far from over and the spoils of war have never been greater. The winner will not only be the victor in the largest platform struggle since computer operating systems, but will also control and influence the future of digital music for years to come.

### *B. Digital Rights Management Technology*

The central controversy hinges on digital rights management (DRM) technology and access to digital music. Each content provider typically has a unique DRM format that is primarily designed to prevent infringement but also has the effect of preventing cross platform use, meaning the digital music file can only be played on specific music players.<sup>498</sup> These content providers, typically comprised of music and movie moguls, were a substantial force behind the anti-circumvention rules included in the DMCA.<sup>499</sup> In sum, the controversy includes three forces: (1) those companies (content providers) that would like to use DRM technology to lock down their content for purposes of avoiding infringement and, more dangerously, to stifle competition; (2) those companies (player providers) that would, for market acceptance reasons and competitive advantage, like to offer their consumers the option to play all DRM formats on their devices; and (3) the digital consumer that wants to enjoy traditional expectations<sup>500</sup> granted by the copyright law.

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<sup>495</sup> *See id.*

<sup>496</sup> Apple, which holds a 65% and 62% market share in the player and download market respectively, announced its plans to offer a \$99 iPod in a clear effort to continue the iPod’s dominance and expand its user base. Brent Schlender, *How Big Can Apple Get?*, FORTUNE, Feb. 21, 2005, available at 2005 WLNR 22686133; *Apple to Sell \$99 iPod, \$499 Mac*, CNNMONEY.COM, Jan. 11, 2005, <http://money.cnn.com/2005/01/11/technology/apple/index.htm?cnn=yes>.

<sup>497</sup> *See generally* Nicolas P. Terry, *GUI Wars: The Windows Litigation and the Continuing Decline of “Look & Feel”*, 47 ARK. L. REV. 93 (1994) (noting the history and dominance of Microsoft’s Windows products).

<sup>498</sup> Pamela Samuelson, *DRM {and, or, vs.} the Law*, COMM. OF THE ACM, Apr. 2003, at 41, 42.

<sup>499</sup> *Id.*

<sup>500</sup> Digital Consumer.org, Bill of Rights, <http://www.digitalconsumer.org/bill.html> (last (continued)

*1. The Major Players*<sup>501</sup>

Apple, who enjoys at least a 65% market share of online music sales,<sup>502</sup> employs a proprietary “AAC” file format that limits how the file is used in terms of platform and number of computers able to play it.<sup>503</sup> Music downloaded from Apple’s iTunes cannot be played on any other player other than the Apple iPod or accompanying software.<sup>504</sup> The same type of model is employed by Napster and Microsoft’s WMA file format.<sup>505</sup> As with Apple’s iTunes, the user may download music in a WMA format embedded with a DRM protection, which limits its playability to Windows Media Player and compatible devices or software.<sup>506</sup> RealNetworks, which offers its downloads in a file format similar to Apple’s AAC, couples its media with its own Helix DRM protection.<sup>507</sup> “Real’s format is supported . . . by one portable player, the Creative Nomad Jukebox Zen Xtra, and by four personal digital assistant devices from PalmOne.”<sup>508</sup> In an effort to achieve cross-platform compatibility, RealNetworks developed its Harmony software that promises iPod users the ability to play files purchased from RealNetworks on their iPod platform,<sup>509</sup> an option quickly being foreclosed by Apple.<sup>510</sup>

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visited Mar. 12, 2006).

<sup>501</sup> The following companies and their distribution formats were selected as the current market leaders as of the time of this writing. However, it is by no means an exhaustive list of market participants. For a full summary of the major content providers see *Power Players 2005: Digital Entertainment 1-20*, BILLBOARD, Aug. 27, 2005, available at LEXIS.

<sup>502</sup> See *supra* note 496.

<sup>503</sup> Wood, *supra* note 494.

<sup>504</sup> Jamey Keaten, *Music's Future: Smaller, Faster, Richer*, MSNBC.COM, Jan. 26, 2005, <http://msnbc.msn.com/id/6872968/>; Wood, *supra* note 494; Apple.com, iTunes: About Third-Party Music Players and AAC File Support, <http://docs.info.apple.com/article.html?artnum=93032> (last visited Mar. 12, 2006).

<sup>505</sup> Wood, *supra* note 494; Napster.com, Quick Help, [http://www.napster.com/quickhelp.html#music\\_files](http://www.napster.com/quickhelp.html#music_files) (last visited Mar. 12, 2006).

<sup>506</sup> Wood, *supra* note 494.

<sup>507</sup> *Id.*; RealNetworks, Customer Support, [http://reclisten.custhelp.com/cgi-bin/reclisten.cfg/php/enduser/std\\_alp.php?st=1](http://reclisten.custhelp.com/cgi-bin/reclisten.cfg/php/enduser/std_alp.php?st=1) (last visited Mar. 12, 2006).

<sup>508</sup> Wood, *supra* note 494.

<sup>509</sup> Real.com, Real Player Music Store, <http://www.real.com/musicstore/?PV=0&PVd=undefined> (last visited Mar. 12, 2006).

<sup>510</sup> Andrew Stein, *Apple: RealNetworks Hacked iPod*, CNNMONEY.COM, July 29, 2004, [http://money.cnn.com/2004/07/29/technology/apple\\_real/](http://money.cnn.com/2004/07/29/technology/apple_real/) (detailing Apple’s statement of potential DMCA claims and counter measures that will render Harmony software inoperable with future versions of iPod software).

The contentious relationship between RealNetworks and Apple evidences the culture of fierce competition and protection in the digital market.

## 2. *DRM and Competition*

Content providers have used the DMCA to restrict the way in which their downloaded media is used.<sup>511</sup> As one author explained: “The main purpose of DRM is not to prevent copyright infringement but to change consumer expectations about what they are entitled to do with digital content,” namely to restrict what platform is used to play the digital media and how that media may be used.<sup>512</sup>

Moreover, digital content providers are employing a tactic whereby the restrictive DRM formats are being used not only to lock up the digital music content market but also to leverage market position in the digital media player market.<sup>513</sup> For example, Apple enjoys a much higher margin on the sale of their iPod products compared to their iTunes products.<sup>514</sup> Apple’s desire to sell its iTunes products is not only aimed at achieving market acceptance for its AAC DRM format, but also to compel the using public to use only iPod players to play their content.<sup>515</sup>

## C. *The Conundrum*

Like Apple, every business seeks high margin products that produce maximum profits. However, in our market system, high margins are eventually tempered by competition.<sup>516</sup> Without legislative or judicial curtailment, such as the kind *Chamberlain* provides, § 1201(a)(2) would

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<sup>511</sup> *A Fine Balance*, *supra* note 476, at 16 (“If content industries overplay their hand, they could end up alienating and losing much of their audience.”).

<sup>512</sup> Samuelson, *supra* note 498, at 1; *see, e.g.*, Chilling Effects, Company Threatens Audio Editing Software Creator (Apr. 20, 2004), <http://www.chillingeffects.org/anticircumvention/notice.cgi?NoticeID=1274>.

<sup>513</sup> Law and IT Webcast, *supra* note 79 (discussing *Lexmark International, Inc. v. Static Controls Components, Inc.*, 387 F.3d 522 (6th Cir. 2004), and the use of the DMCA as anti-competitive tool used to secure market position in parallel markets, i.e. printer-ink cartridges, music download-music player combinations, and in general).

<sup>514</sup> *Apple Declares 2-for-1 Stock Split*, WALL ST. J., Feb. 11, 2005, at B5 (reporting that Apple’s “fiscal first quarter profit more than quadrupled on a 74% increase in sales, reflecting strong demand during the holidays for iPods and Macintosh computers. . . . [Revenue from t]he iPod now accounts for 35% of Apple’s total revenue, compared with about 13% a year ago”).

<sup>515</sup> *See Wood*, *supra* note 494.

<sup>516</sup> ROGER LEROY MILLER, *ECONOMICS TODAY* 509 (10th ed. 1999).

enable companies that operate in parallel markets<sup>517</sup> to suppress natural market forces.<sup>518</sup> In other words, an unbridled § 1201(a)(2) has the unintended effect of allowing companies to preserve their high margin products in one market segment (i.e., Digital Music Player Market—Apple iPod) by employing a protective anti-circumvention measure in another parallel market (i.e., Digital Music Market—potential protective measure implemented with the Apple AAC format). This tactic holds consumers captive in a market deprived of competition,<sup>519</sup> resulting in a market failure.<sup>520</sup>

#### D. *The Significance of Chamberlain*

As illustrated above, providers of digital media and those that manufacture digital media equipment have embraced § 1201(a)(2) as an effective weapon against piracy, but also as a strategy to stifle interoperability and thus competition. Absent a decision like *Chamberlain*, it seemed plausible that a company like Apple could wrap their digital music files in a simple encryption or a “heightened” protective DRM format to avoid interoperability with any other media player other than its own product.<sup>521</sup> Under this scenario, competitor player platforms like

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<sup>517</sup> The term parallel markets is meant to describe two markets that are tied by the nature of products offered in each of those markets, i.e., printers-ink cartridges, music downloads-music players. The performance of one will necessarily have a direct effect on the other, such that, at least in the short-term, they will rise and fall together. Law and IT Webcast, *supra* note 79. For example, every new Apple iTunes customer will necessarily create a new customer for Apple’s iPod or equivalent player software. This is because songs downloaded from iTunes can only be played on Apple players. The same is true with respect to a company like Lexmark, where the greater number of printers sold, necessarily increases the number of ink cartridges sold. The manipulation at issue is when a company like Lexmark attempts to force its printer customers to buy its ink cartridges, thereby leveraging itself into a desirable market position within the cartridge market. This leveraging concept has been introduced and discussed in the context of the DMCA. *Id.* (discussing the *Lexmark* decision and the concept of leveraging for market position in parallel markets).

<sup>518</sup> DMCA Web Cast, *supra* note 487 (discussing the DMCA and the danger of its potential to be used to stifle competition).

<sup>519</sup> This is because an effort to provide interoperability by means of circumventing a protective measure would run afoul of 17 U.S.C. § 1201(a)(2).

<sup>520</sup> MILLER, *supra* note 516, at 526. This application of market failure and competition was also explained by Cory Doctorow in an interview with Doug Kay and Itconversations.com. See DMCA Webcast, *supra* note 487.

<sup>521</sup> This premise is rooted in the Federal Circuit’s language that states, “Chamberlain’s  
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Microsoft's Media Player would not be able to play the Apple iTunes music files. Without circumventing a technological measure, consumers would be forced for the sake of uniformity to strictly use Apple products including downloads from Apple's iTunes website. This would not only harm customer satisfaction, but also the public's acceptance of the digital music paradigm.<sup>522</sup> Certainly, a consumer would not favor a situation where his or her music collection was segregated on the basis of its provider, thereby limiting functionality as a whole.<sup>523</sup> This limitation would require consumers who download digital media to have the corresponding player that is compatible with the content format employed by each provider.

Competition is vital to any successful market. The *Chamberlain* decision challenges the notion of whether digital music companies can prevent the circumvention of a protective proprietary DRM file format for the purpose of cross-platform operation and multiple-vendor compatibility.<sup>524</sup> With no statutory protection for DRM lock down

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proposed construction would allow any manufacturer of any product to add a single copyrighted sentence or software fragment to its product, wrap the copyrighted material in a trivial 'encryption' scheme, and thereby gain the right to restrict consumers' rights to use its products in conjunction with competing products." *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1201 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 923 (2005). The possibility of this scenario was presented by Ernest Miller in a panel discussion detailing the battle being waged in the digital music industry. Law and IT Webcast, *supra* note 79 (discussing the current state of digital music and introducing the premise of using § 1201(a)(2) to control platform choice). The scenario also finds support in news reports that have focused on the digital debate. See Stein, *supra* note 510; Wood, *supra* note 494.

<sup>522</sup> Law and IT Webcast, *supra* note 79.

<sup>523</sup> See, e.g., Posting of Zaphon to Macosxhints Blog, <http://www.macosxhints.com/article.php?story=20030507104823670#> (May 7, 2003, 12:30) (evidencing consumer frustration regarding the fear of liability for posting conversion techniques for the Apple iTunes AAC format and consumer discontent with not being able to play iTune files on other platforms).

<sup>524</sup> Under this proposition, a § 1201(a)(2) claim would fail due to an insufficient relationship between circumvention and protection. See *Chamberlain*, 381 F.3d at 1202. This is because there is an absence of any infringing activity. "Consumers who purchase a product containing a copy of [an] embedded [work] have the inherent legal right to use that copy of the [work]. *Id.* Note that the court in *RealNetworks v. Streambox* did not resolve this issue by finding the Streambox Ripper was not violative of § 1201(a)(2) because of its noninfringing use. See *RealNetworks, Inc. v. Streambox, Inc.*, No. C99-2070P, 2000 U.S. Dist. LEXIS 1889, at \*28 (W.D. Wash. Jan. 18, 2000). There, the court did not consider RealNetworks' proprietary RealMedia format a technological measure as defined by § 1201(a)(3)(A) because it employed no protection like the one described in the

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formats, digital music providers will be forced to compete for consumers who are free to switch platforms at will and will lose the advantage of tying consumers to a specific content format. In the same vein, the market for music player software will likely broaden to include companies other than the content providers that distribute the music. The *Chamberlain* decision will reduce barriers of entry for smaller companies who do not have the resources to couple their players with a supporting catalog of music.<sup>525</sup> Also, because of competitive forces, it should be expected that the digital media player device manufacturers will strive not only to develop the features consumers desire but also the functionality that they expect, namely the ability to play music files that have been acquired from different providers in varying formats. *Chamberlain's* shift in judicial interpretation will open the door to consumer rights in the digital age and restore the balance between exclusive rights and public access.<sup>526</sup>

#### *E. Going Forward*

The tension between securing rights and providing reasonable access will seemingly shape future case law and legislation. The anti-circumvention provisions have previously been construed so as to pose a challenge to the essential balance of rights by allowing the copyright holder to assert far-reaching control over the use of the copyrighted work.<sup>527</sup> The *Chamberlain* decision brings copyright law back into the realm of reasonability and progress. As the Supreme Court noted,

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hypothetical. *Id.*

<sup>525</sup> This notion has come to fruition since the initial draft of this note. See Robin Peek, *Can DRM play nice?*, INFO. TODAY, June 2005, at 19. Peek reported that

the HYMM Project[, an Apple DRM-breaker,] states that its software “allows you to exercise your fair-use rights under copyright law [and] allows you to free your iTunes Music Store purchases (protected AAC/.m4p) from [its] DRM restrictions *with no loss of sound quality.*” PyMusique claims: “These songs can then be played outside of the iTunes environment, even on operating systems not supported by iTunes and on hardware not supported by Apple.”

*Id.* at 20.

<sup>526</sup> See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“[P]rivate motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. . . . When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.”); Digital Consumer.org, *supra* note 504).

<sup>527</sup> Shandra J. Kotzun, Comment, *The Digital Millennium Copyright Act:*  
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The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.”<sup>528</sup>

In its decision, the Federal Circuit took a step forward in both curing a muddled statute and restoring the traditional notions of copyright law.

#### CONCLUSION

In its conclusion, the court formulated a clear test that must be satisfied in order for a plaintiff to establish a prima facie case under § 1201(a)(2).<sup>529</sup> The court concluded that Chamberlain’s claim failed for two reasons: first, it failed to show a lack of authorization; and second, it failed to show “the critical nexus between access and protection,” where the claim of circumvention is reasonably related to an allegation of infringement.<sup>530</sup> Here, Security+ GDO owners were authorized to use the embedded software by the Copyright Act and “Chamberlain neither alleged copyright infringement *nor explained how the access provided by the Model 39 transmitter facilitate[d] infringement* [of a protected right].”<sup>531</sup> Thus, because Model 39 users were “immune from § 1201(a)(1) circumvention liability,” it necessarily followed that Skylink could not be liable for § 1201(a)(2) trafficking. In affirming the district court’s ruling, the court

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*Anticircumvention Ban Gives More Rights to Copyright Owners*, 3 TUL. J. TECH. & INTELL. PROP. 117, 133–34 (2001). The congressional findings of the DFCA state that

[c]ontrary to the intent of Congress, Section 1201 . . . has been interpreted to prohibit all users—even lawful ones—from circumventing technical restrictions for any reason. As a result, the lawful consumer cannot legally circumvent technological restrictions, even if he or she is simply trying to exercise a fair use or to utilize the work on a different digital media device.

H.R. 5522, 107th Cong. § 2(7) (2002).

<sup>528</sup> Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 n.10 (1984) (quoting H.R. REP. NO. 2222, at 7 (1909)).

<sup>529</sup> Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1203 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 923 (2005).

<sup>530</sup> *Id.* at 1204.

<sup>531</sup> *Id.*

held that the granting of summary judgment was proper and that the district court did not err in its analysis of Chamberlain's allegations or rejecting its claim that Skylink and its users lacked authorization.

To support the implied nexus requirement and conclusion that the Act did not create a new property right, the court reached to the legislative intent and irreconcilable results that would result from a plain reading of the statute. The court succeeded in developing a rule of reason approach to § 1201(a)(2) claims and went to great lengths to reconcile a line of cases that have applied § 1201(a)(2)'s plain language to indiscriminately foreclose any circumvention within the Act's definition. However, the opinion is not without its flaws. In an abrupt change, the court's analysis lessens the practical distinction between § 1201(a) and (b) and provides mixed results in interpreting the role of the statutory exemptions. Furthermore, the court's nexus requirement is a change from previous § 1201(a) decisions. This will continue to fuel the controversy surrounding § 1201. In addition, the *Chamberlain* decision may cast a new light on previous battles, give new life to legislative efforts, and impact the future of the digital music industry and competition in general.

The DMCA was passed to deal with challenges of the digital world, not to create a new property right. However, a plain reading of the statute yields very broad anti-circumvention provisions which, if left unbridled, would threaten the long standing compromise between the copyright holder's exclusive rights and the public's interest in access. *Chamberlain* has made a major contribution to the effort of preserving the cherished balance copyright law seeks to provide to society.





