

YES, IT'S ILLEGAL TO CHEAT A PAYWALL: ACCESS RIGHTS AND THE DMCA'S ANTICIRCUMVENTION PROVISION

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Traditional media companies, such as newspapers, have struggled to adjust their profit models to the Internet economy. Some newspapers have instituted “paywalls,” digital locks that limit access to online articles with varying degrees of logistical and financial success. As paywalls proliferate to protect digital media, methods for circumventing those paywalls develop and propagate just as quickly. The Digital Millennium Copyright Act (DMCA) prohibits circumventing an effective technological means of control that restricts access to a copyrighted work. However, two competing interpretations of the statute have emerged. The more widespread approach, the infringement-nexus interpretation, requires a nexus between circumvention and traditional copyright infringement to prove a violation of the statute. By contrast, the access-right interpretation reads the statute literally as providing a new right of access control to owners of copyrighted works. This Note argues that the access-right interpretation correctly reflects Congress’s intent by recognizing that the right to access a work—not just to copy or distribute it—has real value that deserves protection. However, the DMCA has some inherent problems that prevent it from offering effective, meaningful protection to the right of access. This Note discusses those problems and offers solutions for ensuring more effective protection to this newly recognized and increasingly valuable right.

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INTRODUCTION

Imagine the following scenario: Linus navigates to an online news article from the *Silicon Valley Herald* about an unusual friendship between a penguin and a fox at the local zoo. The article loads fully in his browser, but Linus cannot view the article because it is obscured by a digital paywall requiring a password as evidence of a paid subscription. The paywall uses cookies (snippets of data that a website stores on a user’s computer) to monitor the number of articles Linus has viewed. The cookies stored in Linus’s browser show that Linus has viewed too many articles without paying, triggering the paywall.

Clever Linus sidesteps the paywall by deleting the cookies from his browser and reloading the page. The website can no longer detect that Linus has viewed too many free articles, and it loads the page without activating the paywall, providing Linus with free access to the previously blocked article and allowing him to read about the unlikely zoo pals without paying a dime. Did Linus break the law? It depends on whom you ask.

Some would answer yes: Linus violated the Digital Millennium Copyright Act (DMCA)¹ because he sneaked past a paywall that controlled access to a copyrighted work. Even though he did not infringe the underlying copyright, the mere act of dodging the paywall is enough to violate the DMCA.² Others would answer no: Linus gained access to a copyrighted work, but he did not infringe the copyright because he did not make copies of the article or distribute the article's text as an email forward to all his friends.³ Therefore, he did *not* violate the DMCA.⁴ Who's right?

¹ 17 U.S.C. § 1201(a)(1)(A) (2012) (providing that “[n]o person shall circumvent a technological measure that effectively controls access” to a copyrighted work).

² See, e.g., *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 952 (9th Cir. 2010) (holding that a plaintiff need not prove a nexus to infringement to establish a cause of action under 17 U.S.C. § 1201(a)(2)); see also *infra* Part II.B.1 (discussing *Blizzard* and its interpretation of the DMCA).

³ Depending on the design and function of the paywall, just accessing the page could arguably infringe traditional copyright. A court could conceivably hold that a user who loads a website's HTML file in his browser has created a copy, and that doing so while preventing the paywall from operating means the copy is unauthorized and squarely within the prohibitions of 17 U.S.C. § 106. See, e.g., *CoStar Realty Info., Inc. v. Field*, 737 F. Supp. 2d 496, 507 (D. Md. 2010) (citing *Ticketmaster L.L.C. v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096, 1105, 1110 (C.D. Cal. 2007)) (“[T]he cache copy of a webpage, which is automatically stored in the temporary memory of a user's computer upon viewing a webpage, alone constitutes copyright infringement . . .”). However, this is not the only logical conclusion a court could reach. The court could instead describe the same action as decrypting, bypassing, avoiding, or deactivating an access-control measure without infringing any of the traditional rights of the copyright holder. See *Blizzard*, 629 F.3d at 945 (explaining that not all actions that § 1201(a)(3)(A) defines as unlawful circumvention “necessarily result in someone's reproducing, distributing, publicly performing, or publicly displaying the copyrighted work”). Furthermore, the *Blizzard* court explicitly described analogous actions as “non-infringing access” and recognized the ability of copyright holders to collect payment for “valuable non-infringing access—for instance, copyright owners who make movies or music available online, protected by an access control measure, in exchange for direct or indirect payment.” *Id.* at 950; see also *infra* Part II.B.1 (discussing *Blizzard* and its interpretation of the anticircumvention provisions of the DMCA). This Note proceeds on the assumption that, as the Ninth Circuit suggested, at least some paywalls may be illegally circumvented without also infringing traditional copyright. See *infra* Part I.A.2 (discussing paywall circumvention that would violate § 1201(a) but may not infringe traditional copyright).

⁴ See, e.g., *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1204 (Fed. Cir. 2004) (requiring a plaintiff to demonstrate a nexus between the defendant's actions and traditional copyright infringement to establish a cause of action under 17 U.S.C.

On its face, the language of the DMCA appears to forbid users from picking any digital lock on a copyrighted work, regardless of what users do with that copyrighted work after accessing it. The statute provides that “[n]o person shall circumvent a technological measure that effectively controls access” to a copyrighted work.⁵ But the question of just what behavior violates the anticircumvention provision nonetheless has given rise to two competing interpretations, which I call the “access-right” interpretation and the “infringement-nexus” interpretation.

The infringement-nexus interpretation, as applied by the court in *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*,⁶ holds that circumventing an access protection measure violates the DMCA only if that circumvention is linked to infringement or facilitating infringement of the underlying copyright.⁷ This interpretation is the more popular of the two; it has been applied by the Federal Circuit,⁸ the Sixth Circuit,⁹ and various district courts.¹⁰ As the Federal Circuit has explained the test, a user does not violate the anticircumvention provision unless his act of circumvention bears a nexus to traditional copyright infringement.¹¹ In other words, a user who circumvents a newspaper paywall to read an article, for example, is only liable under the DMCA if his act of circumvention is reasonably related to an infringing use of that article, such as making or distributing copies of the article without a license.

§ 1201(a)(2)); see also *infra* Part II.A.1 (discussing *Chamberlain* and its interpretation of the DMCA).

⁵ 17 U.S.C. § 1201(a)(1)(A).

⁶ 381 F.3d 1178.

⁷ *Id.* at 1204.

⁸ See, e.g., *Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc.*, 421 F.3d 1307, 1319 (Fed. Cir. 2005) (applying the infringement-nexus interpretation to § 1201(a)(1)); *Chamberlain*, 381 F.3d at 1203–04 (same).

⁹ See, e.g., *United States v. Reichert*, 747 F.3d 445, 458 (6th Cir. 2014) (Donald, J., dissenting) (“[S]everal courts, including ours, have held that circumvention technologies designed primarily for purposes other than to bypass copyright restrictions are not within the ambit of the DMCA’s anti-circumvention provision.” (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004); *Chamberlain*, 381 F.3d at 1203–04)).

¹⁰ See, e.g., *RealNetworks, Inc. v. DVD Copy Control Ass’n*, 641 F. Supp. 2d 913, 931–32 (N.D. Cal. 2009) (“The DMCA created new causes of action . . . for circumvention of access controls in ways that facilitate copyright infringement”); *Agfa Monotype Corp. v. Adobe Sys., Inc.*, 404 F. Supp. 2d 1030, 1034–40 (N.D. Ill. 2005) (analyzing a claim under the *Chamberlain* test).

¹¹ See *Chamberlain*, 381 F.3d at 1204 (“A copyright owner seeking to impose liability on an accused circumventor must demonstrate a reasonable relationship between the circumvention at issue and a use relating to a property right for which the Copyright Act permits the copyright owner to withhold authorization—as well as notice that authorization was withheld.”).

Under the access-right interpretation, applied by the Ninth Circuit in *MDY Industries, LLC v. Blizzard Entertainment, Inc.*,¹² the DMCA creates new liability for the act of circumvention alone, regardless of any connection to the traditional exclusive rights of the copyright holder.¹³ That is, a user who circumvents a newspaper paywall to read an article incurs liability under the statute for the very act of circumvention—whether or not he ever infringed traditional copyright or took any action beyond circumvention. Under the access-right interpretation, 17 U.S.C. § 1201(a) adds a new right to the exclusive rights of traditional copyright holders: the right to prevent users from accessing a work.¹⁴ To date, the Ninth Circuit is alone in adopting this interpretation of the statute.

This Note argues that the access-right interpretation of the anticircumvention provision of the DMCA correctly recognizes that the DMCA creates a valuable new right of digital access control, and that applying the statute to digital paywalls reveals both the need for access-control rights and some of the problems Congress created in trying to meet that need. This Note is the first to argue that circumventing a paywall may violate the DMCA under the access-right interpretation, even when no copyright infringement occurs.¹⁵ This access-

¹² See 629 F.3d 928, 952 (9th Cir. 2010) (concluding that Congress created an “anti-circumvention” right under § 1201(a)).

¹³ See *id.* (“In sum, we conclude that a fair reading of the statute (supported by legislative history) indicates that Congress created a distinct anti-circumvention right under § 1201(a) without an infringement nexus requirement.”).

¹⁴ *Id.*

¹⁵ No scholarly works to date have examined the applicability of the DMCA’s anticircumvention provision to online paywalls. Technology bloggers have raised the question but have not conducted the necessary legal analysis to reach a conclusion. See, e.g., Mike Masnick, *Am I Violating the DMCA by Visiting the NYTimes with NoScript Enabled?*, TECHDIRT (Mar. 22, 2011, 11:43 AM), <https://www.techdirt.com/articles/20110322/03485913583/am-i-violating-dmca-visiting-nytimes-with-noscript-enabled.shtml> (asking the question rhetorically without offering an answer); Steve Williams, *Circumventing New York Times Paywall: Legal?*, SBW.ORG (Oct. 29, 2014), <http://www.sbw.org/nytimes> (“If I write a program to bypass the *New York Times* paywall, strictly for my own use, will I be violating [the] DMCA?”).

Legal scholars have examined the two different interpretations of the DMCA’s anticircumvention provision at length. See, e.g., Jane C. Ginsburg, *From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, 50 J. COPYRIGHT SOC’Y U.S.A. 113, 118 (2003) [hereinafter Ginsburg, *Access Right*] (“Several commentators have recognized that the DMCA’s provisions on circumvention of access protections in effect create a new right under, or perhaps over, copyright: the right to control access to copyrighted works.”); see also Zohar Efroni, *A Momentary Lapse of Reason: Digital Copyright, the DMCA and a Dose of Common Sense*, 28 COLUM. J.L. & ARTS 249 (2005) (discussing the two interpretations of § 1201(a)); Jane C. Ginsburg, *Copyright Legislation for the “Digital Millennium,”* 23 COLUM.-VLA J.L. & ARTS 137, 140–43, 147–48 (1999) [hereinafter Ginsburg, *Copyright Legislation*] (recognizing that the DMCA created a new access right); Kamiel J. Koelman, *A Hard Nut to Crack: The*

right application of the DMCA reflects the reality that in the digital world, copyright owners may sometimes care very little about users making *copies* of a work, and much more about users gaining *access* to a work.¹⁶

However, the application of the DMCA to digital paywalls also illustrates some of the policy problems inherent in the statutory language. For example, the statutory language makes almost no allowance for user privacy. This is particularly problematic in the context of paywalls because many paywalls function by storing cookies on users' computers. Some users object to the widespread use of cookies because of privacy or computer performance issues, but the DMCA provides only limited exemptions for deleting or blocking those cookies.¹⁷ Additionally, the DMCA's anticircumvention provision neither helps copyright owners nor threatens access circumventers. For example, it would hardly be cost-effective for the *Silicon Valley Herald* to chase Linus down and sue him over a DMCA violation; Linus and his fellow paywall scofflaws thus have little to fear by way of litigation. Effectively, the *Herald* cannot use the statute to punish unauthorized access to its articles.¹⁸

If the DMCA does not successfully protect copyrighted works against individual circumventers, what options does the hypothetical copyright owner realistically have? Amending the statute is one solu-

Protection of Technological Measures, 22 EUR. INTELL. PROP. REV. 272, 274–75 (2000) (same); Robert Arthur, Comment, *Federal Circuit v. Ninth Circuit: A Split over the Conflicting Approaches to DMCA Section 1201*, 17 MARQ. INTELL. PROP. L. REV. 265, 284 (2013) (analyzing the two interpretations of § 1201(a) and proposing that the Supreme Court resolve the circuit split in favor of the Federal Circuit's interpretation in *Chamberlain*); Michael Czolacz, Comment, *Decrypting DMCA § 1201 in the Wake of the Ninth Circuit's Ruling in MDY Industries v. Blizzard Entertainment*, 11 NW. J. TECH. & INTELL. PROP. 441, 455–56 (2013) (analyzing the two interpretations of § 1201(a) and advocating for a judicial definition of the word "access" in the statute).

A few have assessed the applicability of copyright and the DMCA to digital media in general or newspapers in particular. See, e.g., Priya Barnes, Note, *The Prospects for Protecting News Content Under the Digital Millennium Copyright Act*, 3 HARV. J. SPORTS & ENT. L. 201, 203 (2012) (assessing protections for news content under the antitrafficking provisions of the DMCA in § 1201(a)); Keiyana Fordham, Note, *Can Newspapers Be Saved? How Copyright Law Can Save Newspapers from the Challenges of New Media*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 939, 942 (2009) (discussing the applicability of copyright law to news aggregators and other digital news media). However, to date, no scholar has analyzed digital paywalls under the DMCA's anticircumvention provisions.

¹⁶ See Ginsburg, *Access Right*, *supra* note 15, at 113 ("When the exploitation of works shifts from having copies to directly experiencing the content of the work, the author's ability to control access becomes crucial.").

¹⁷ See *infra* Part II.B.2 (noting the privacy concerns inherent in requiring Internet users to allow websites to store data on their computers).

¹⁸ See *infra* Part III.C.2 (discussing the ineffectiveness of the DMCA as a deterrent to individual circumventers).

tion; alternatively, copyright owners might continue to pursue market-based technological solutions and rely on social norms that reinforce payment for access. This Note considers the merits of each of these options.¹⁹

This Note proceeds in four Parts. Part I discusses the nature of paywalls and the DMCA's structure and history. Part II analyzes the two competing interpretations of the DMCA's anticircumvention provisions, using the *Chamberlain* and *Blizzard* decisions as lenses through which to explore the interpretations' rationales and flaws. Part III applies the access-right interpretation to the paywall, both demonstrating the access-right model's utility in protecting digital media and revealing problems inherent in the current statute. Part IV assesses alternative means of protecting access rights, including market forces, social norms, and amending the statute.

I

THE TECHNOLOGY AND THE LAW

This Part lays the foundation for later analysis by providing necessary background on both paywalls and the DMCA. Part I.A explains paywalls by examining one of the most successful examples: the *New York Times* paywall. I discuss both the economic pressures leading to the paywall's adoption and the technological features that make this paywall particularly interesting from a legal standpoint. Part I.B offers a brief background of the DMCA and situates its anti-circumvention provision in the context of traditional copyright law.

A. Anatomy of a Porous Paywall: The New York Times

1. The Economic Environment

When the *New York Times* announced that it would launch a paywall on March 28, 2011, the widely discussed move initially encountered extreme skepticism.²⁰ Previous media outlets had made attempts to limit access to online content but had met with little suc-

¹⁹ See *infra* Part IV (describing ways of protecting the right of access other than the current DMCA anticircumvention provision).

²⁰ See, e.g., Mike Masnick, *It Took the NY Times 14 Months and \$40 Million Dollars to Build the World's Stupidest Paywall?*, TECHDIRT (Mar. 17, 2011, 11:36 AM), <http://www.techdirt.com/articles/20110317/10393913530/it-took-ny-times-14-months-40-million-dollars-to-build-worlds-stupidest-paywall.shtml> (expressing scorn for the design of the *New York Times* paywall); Felix Salmon, *The NYT Paywall Arrives*, REUTERS (Mar. 17, 2011), <http://blogs.reuters.com/felix-salmon/2011/03/17/the-nyt-paywall-arrives> (expressing doubt about the financial viability of the paywall and concern that “[t]he upside is limited [and] the downside is that [the *Times*] ceases to be the paper of record for the world”).

cess.²¹ The *New York Times* itself had recently retired a previous version of a paywall called TimesSelect, which provided free access to most content but charged a premium subscription rate for content such as columns and the opinion section.²² The *New York Times*' current paywall uses the so-called "metered model," in which users can access a certain number of articles without a subscription but are blocked from reading more without paying when they have reached the maximum.²³ The *New York Times* allows web browsers to read ten articles per month for free before the paywall blocks more reading.²⁴ While observers disagree as to whether the *New York Times*' metered model will help the company return to financial viability,²⁵ many have been surprised by the popularity of this subscription model.²⁶

²¹ See STEVEN WALDMAN, FED. COMM'NS COMM'N, THE INFORMATION NEEDS OF COMMUNITIES 23 (2011), available at http://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf ("2010 was supposed to be the Year of the Paywall for newspapers. But consumers overwhelmingly repudiated the efforts of the few publishers who dared to demand payment for access to the news" (quoting Alan D. Mutter, *The State of Play for Paid Content, 2011*, EDITOR & PUBLISHER (Feb. 11, 2011), <http://www.editorandpublisher.com/Article/E-P-Exclusive-the-state-of-play-for-paid-content-2011>)); see also, e.g., Mathew Ingram, *It's Official: News Corp.'s Paywalls Are a Bust*, GIGAOM (Nov. 2, 2010, 8:09 AM), <http://gigaom.com/2010/11/02/news-corp-paywall/> (describing the financial failure of News Corp.'s paywalls on two British papers, the *Times* and the *Sunday Times*).

²² See Vivian Schiller, *A Letter to Readers About TimesSelect*, N.Y. TIMES, <http://www.nytimes.com/ref/membercenter/lettertoreaders.html> (last visited Feb. 10, 2015) (explaining that the TimesSelect program, which had limited certain features such as column and archive access to paying customers, would end).

²³ Eric Pfanner, *Papers Worldwide Embrace Web Subscriptions*, N.Y. TIMES, Apr. 1, 2013, at B4, available at <http://www.nytimes.com/2013/04/01/business/media/more-newspapers-are-making-web-readers-pay.html> ("Among higher-brow publications, the favored approach to digital payment seems to be the so-called metered model, under which casual visitors to a newspaper Web site are not charged, while those who pass a certain threshold—say, 10 articles a month—are required to pay.")

²⁴ *Help: Digital Subscriptions*, N.Y. TIMES, <http://www.nytimes.com/content/help/account/purchases/subscriptions-and-purchases.html#digital-sub-no-sub> (last visited Feb. 10, 2015).

²⁵ Compare Henry Blodget, *These Numbers Show Why the New York Times Is Firing More Journalists*, BUS. INSIDER (Dec. 3, 2012, 10:50 AM), <http://www.businessinsider.com/why-new-york-times-is-firing-more-journalists-charts-2012-12> (arguing that the paywall's success is not enough to right the paper's financial troubles resulting from shortfalls in paper subscriptions), with D'Arcy Doran, *Pay Wall Economics: Has the Subscription Model Reached a Tipping Point?*, FINANCIALIST (Apr. 12, 2013), <http://www.thefinancialist.com/pay-wall-economics-has-the-subscription-model-reached-a-tipping-point/> (describing the growing use of paywalls as other newspapers mimic the *New York Times*' model).

²⁶ See *infra* notes 43–44 (discussing the paywall's apparent success).

2. *The Technology of a Paywall*

While the precise technical details and merits of online paywall design are well beyond the scope of this Note, the nature of a technological design often implicates the way a court will apply copyright law.²⁷ In this case, the technical design and function of the *New York Times* paywall create a perfect example of the applicability of the DMCA's anticircumvention provisions as isolated from any violation of the rights enumerated in 17 U.S.C. § 106 for copyright holders.²⁸

Websites are usually built using HTML, a particular kind of code language.²⁹ Websites frequently use other languages, such as JavaScript or Macromedia Flash, to add features to the basic HTML framework.³⁰ The *New York Times* paywall, as originally constructed, is a relatively simple JavaScript program that runs on top of the loading page.³¹ Think of the HTML-coded page as a painting, and the JavaScript code as a veil that can be drawn over that painting; they are connected, but distinct from one another. The website tracks how many articles the user has read that month. Every time a user visits a *New York Times* article, the cookie adds another tick to its counter, until it hits ten articles in a single calendar month.³² That cookie provides information to the JavaScript code embedded in the webpage, which then determines based on that information whether to activate

²⁷ See, e.g., *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1067–70 (9th Cir. 2013) (discussing the technological aspects of a program that skipped television commercials and its implications for copyright); *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 689–94 (2d Cir. 2013) (assessing the design of Aereo's array of tiny antennas and determining that the assignment of each antenna to a unique user means that the transmission of the broadcasts is not an infringing public performance under the Copyright Act), *rev'd sub nom.* *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

²⁸ See *infra* note 52 and accompanying text (outlining the rights enumerated in 17 U.S.C. § 106).

²⁹ See Yoshitaka Shiotsu, *Web Development 101: Top Web Development Languages in 2014*, oDESK BLOG (Mar. 19, 2014), <https://www.odesk.com/blog/2014/03/web-development-101-top-web-development-languages-2014> (listing coding languages commonly used to build modern websites).

³⁰ *Id.*

³¹ See Masnick, *supra* note 15 (“[T]he ‘paywall’ itself has apparently been written in Javascript, meaning that when you do hit the wall, the full article you want to read actually loads in the HTML, it’s just then blocked by some script asking you to pay up.”); see also Joshua Benton, *Here’s What the New York Times Paywall Looks Like (to Canadians)*, NIEMAN JOURNALISM LAB (Mar. 17, 2011, 7:12 PM), <http://www.niemanlab.org/2011/03/heres-what-the-new-york-times-paywall-looks-like-to-canadians> (discussing the function of the *New York Times* paywall).

³² See Tim Brookes, *5 Ways to Get Around the New York Times Paywall*, MAKEUSEOF (Mar. 30, 2011), <http://www.makeuseof.com/tag/5-ways-york-times-paywall/> (describing the *New York Times* paywall’s use of cookies); *Help: Digital Subscriptions*, *supra* note 24 (stating that users can access ten free articles each calendar month).

the overlay.³³ When a user attempts to access an article and the cookie indicates that the user has already read ten or more articles that month, the JavaScript code blocks the user from reading the article.³⁴ Specifically, the full article text appears in the HTML code, but the JavaScript code draws its digital veil over the page, freezing the ability to scroll down the page and covering most of the visible text with a message asking the reader to subscribe for full access.³⁵

The technological design of the *New York Times* paywall is particularly interesting from a copyright perspective. It does not prevent the text of the article from loading in the browser, but it can prevent the user from being able to view that text.³⁶ In other words, the system is not like a traditional pay-for-product model, where a customer hands over money at a traditional newsstand and only then receives a newspaper. Instead, this paywall approximates a model where the newsstand gives you a complete newspaper for free, but keeps it closed with a padlock that can only be opened if you pay. When the paywall activates, the *copy* has already been delivered; it is only *access* that must be purchased. This feature underscores the fact that it is ultimately access to content that at least some copyright owners find more worthy of protection than the copy itself. Similarly, streaming media services such as Netflix, Hulu Plus, and Spotify Premium sell access to copyrighted digital media, but do not provide copies of the works except for the most fleeting temporary versions necessary to produce the streamed content.³⁷ Traditional copyright assigns value to and protects the original works, but it offers no protection for streamed access itself,³⁸ providing another example of the poor fit between traditional copyright and the increasing value of access to digital media.

The way the *New York Times* paywall is constructed makes it relatively easy to get around in ways that were immediately obvious to tech-savvy observers.³⁹ In fact, the paywall launched in Canada before it launched in the United States, which allowed some particularly

³³ Benton, *supra* note 31.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* (“[The appeal to subscribe] doesn’t appear on a page by itself; it appears overlaid on top of the actual article you were trying to read.”).

³⁷ Tracy V. Wilson, *How Streaming Video and Audio Work*, HOWSTUFFWORKS (Oct. 12, 2007), <http://computer.howstuffworks.com/internet/basics/streaming-video-and-audio4.htm> (describing various methods of streaming).

³⁸ See 17 U.S.C. § 106 (2012) (proscribing unauthorized reproduction, derivative works, distribution, public performance, and public display, but not unauthorized access).

³⁹ Benton, *supra* note 31 (assessing the initial paywall design and concluding that it was “awfully permeable”).

clever U.S. users to find ways to view the site remotely and figure out how the paywall worked even before it launched in America.⁴⁰ Because the paywall is not embedded in the HTML coding of the page itself, but in a JavaScript code overlay instead, the JavaScript paywall can be peeled away easily in a number of ways,⁴¹ leaving the HTML-based page intact—like drawing back the veil on a painting. The *New York Times* appears to be aware of and monitoring at least some of these means of circumvention, as it shut down one of the more popular methods in 2013.⁴²

Although the paywall is extremely easy to circumvent, subscription rates have exceeded expectations.⁴³ While some predicted that users would be unlikely to begin paying for content that previously had been free, the *New York Times* reported that it had more than 100,000 subscribers in just the first month.⁴⁴ This not only defied expectations, but also made a powerful case for the argument that users are willing to pay for content that could be accessed freely in other ways.⁴⁵ Significantly, users were willing to pay for merely online

⁴⁰ See, e.g., *id.* (offering an example of a user who had experience with the paywall before it launched in the United States); Masnick, *supra* note 15 (discussing an early observer of the paywall's launch in Canada and concluding that the paywall was "barely any wall at all").

⁴¹ For fear of running afoul of the DMCA's ban on distributing circumvention methods, see *infra* Part II.B (describing the DMCA restriction on distributing methods of circumventing copyright protection), I do not provide examples or instructions for circumventing any particular paywall; suffice it to say that interested readers can easily learn more with a simple online search.

⁴² See Joe Coscarelli, *New York Times Closes Every Cheapskate's Favorite Paywall Loophole*, N.Y. DAILY INTELLIGENCER (Feb. 11, 2013, 7:57 PM), <http://nymag.com/daily/intelligencer/2013/02/new-york-times-closes-url-paywall-loophole.html> (reporting on this strengthening of the paywall). Coscarelli quoted *Times* spokesperson Eileen Murphy's statement: "When we launched our digital subscription plan we knew there were loopholes to access our content beyond the allotted number of articles each month. We have made some adjustments and will continue to make adjustments . . . to prohibit abuse and protect the value of our content." *Id.*; see also Ashley Feinberg, *Two Years Later, the New York Times Closes Its Paywall's Most Gaping Hole*, GIZMODO (Feb. 12, 2013, 11:28 AM), <http://gizmodo.com/5983673/two-years-later-the-new-york-times-closes-its-paywalls-most-gaping-hole> (observing and commenting on the same change in the paywall).

⁴³ See Edmund Lee, *The New York Times Paywall Is Working Better than Anyone Had Guessed*, BLOOMBERG TECH BLOG (Dec. 20, 2012), <http://go.bloomberg.com/tech-blog/2012-12-20-the-new-york-times-paywall-is-working-better-than-anyone-had-guessed/> (describing the financial success that the *New York Times* paywall has enjoyed thus far).

⁴⁴ Glynnis Macnicol, *WOW: The NYT.com Already Has 100,000 Paid Digital Subscribers*, BUS. INSIDER (Apr. 21, 2011, 9:20 AM), <http://www.businessinsider.com/nyt-100000-digital-subscribers-paywall-2011-4>.

⁴⁵ Similarly, iTunes is widely credited with proving that music users would still pay for content that they could download illegally elsewhere. Professor Mark Schultz describes the groundbreaking example of iTunes: "Given the choice between free music and paying, with an extremely small chance of being sued for infringement, one might predict that potential iTunes customers would opt for free music instead. This prediction is contradicted by a

access, without receiving permanent copies of the articles or the right to distribute or duplicate them. This illustrates the idea that there is a new source of value that copyright owners may seek to protect: the right of access.⁴⁶

B. *The DMCA*

The Digital Millennium Copyright Act was introduced to modernize copyright law and ensure that copyright owners could protect their rights in the digital world,⁴⁷ as well as to harmonize U.S. law with global intellectual property treaties.⁴⁸ The ambitious statute was hailed as a triumph of bipartisan cooperation, bringing Democrats and Republicans together to solve a weighty problem.⁴⁹ The statute created an array of solutions to problems facing copyright owners online; among the best-known of these provisions are the “safe harbor” provision,⁵⁰ the DMCA takedown notice procedure,⁵¹ and the anti-circumvention provision. The anticircumvention provision of 17 U.S.C. § 1201(a) added a new right to the existing copyright regime: the right of copyright holders to control access to their work.

First, a brief explanation of the federal copyright scheme and the alteration that the DMCA introduces. Traditional copyright confers certain exclusive rights on the holder of a copyright: the right to reproduce the work by making copies, the right to prepare derivative works, the right to distribute copies to the public, the right to perform the work publicly (in the case of literary, musical, dramatic, and choreographic works), the right to display the work publicly, and the right to perform the work publicly by digital transmission (in the case

billion paid downloads from iTunes as of February 23, 2006.” Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 725 (2006).

⁴⁶ See Ginsburg, *Access Right*, *supra* note 15, at 124 (“As we move to an access-based world of distribution of copyrighted works, a copyright system that neglected access controls would make copyright illusory, and in the long run it would disserve consumers. Access controls make it possible for authors to offer end-users a variety of distinctly priced options for enjoyment of copyrighted works.”).

⁴⁷ See David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA’s Commentary*, 23 CARDOZO L. REV. 909, 915–16 (2002) (stating that the DMCA aimed in part “to update United States copyright law . . . for the world of the Internet”).

⁴⁸ See H.R. REP. NO. 105-796, at 63–72 (1998) (Conf. Rep.), *reprinted in* 1998 U.S.C.C.A.N. 639, 640–48 (describing the goals of the DMCA); Nimmer, *supra* note 47, at 915, 921 (explaining that Congress adopted the DMCA in large part to comply with international law).

⁴⁹ See Nimmer, *supra* note 47, at 959–60 (describing congressional self-congratulation on the bipartisan passage of the DMCA).

⁵⁰ 17 U.S.C. § 512(c) (2012).

⁵¹ *Id.*

of sound recordings).⁵² Copyright holders have the right to perform any of these acts and, more importantly, to forbid or permit others to perform these acts. These rights, to which I refer collectively as “traditional” copyright, are expansive, but they do not include an exclusive right of access.⁵³ In other words, under the pre-DMCA Copyright Act, a copyright owner could not prevent a person from *viewing* the copyrighted work, provided that the viewer did not infringe any of the exclusive rights to do so (e.g., by making a copy for his own use).

The paywall technology described above reveals the problem inherent in a regime that protects copying and not access. In these paywalls, the article’s text loads completely; it is “fixed in a[] tangible medium of expression” that “can be perceived, reproduced, or otherwise communicated,”⁵⁴ despite the fact that it may be obscured by the JavaScript overlay. Any person who directs a browser to the page’s address receives a full copy of the article, even though she may require “the aid of a machine or device” to view or translate code or to remove the overlay.⁵⁵ Arguably, traditional copyright would not be implicated in circumventing a paywall in which a fixed copy of the article is freely given; only *access* is unfairly gained when one removes the JavaScript overlay.

Access to a copyrighted work, however, is valuable in and of itself in the digital age.⁵⁶ It had not previously been protected because the ability to access a work was far more easily regulated by traditional copyright protections before the Internet was widely and popularly accessible.⁵⁷ When copyrighted works could only be reproduced using physical media such as paper or tape, the difficulty and cost of creating and selling copies provided a natural check on the propagation of illegal copies, but that natural check vanished when digital reproduction made it possible to produce perfect or near-perfect copies of

⁵² *Id.* § 106(1)–(6).

⁵³ See sources cited *supra* note 15 and accompanying text (discussing the DMCA’s addition of an access right).

⁵⁴ 17 U.S.C. § 102(a) (2012).

⁵⁵ *Id.*; see *Tandy Corp. v. Pers. Micro Computers, Inc.*, 524 F. Supp. 171, 173 (N.D. Cal. 1981) (stating that copyright attaches to a work regardless of “whether it is capable of perception directly or by means of any machine or device ‘now known or later developed’” (quoting H.R. REP. NO. 94-1476, at 52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665)).

⁵⁶ See generally Ginsburg, *Copyright Legislation*, *supra* note 15 (describing the value of access in a digital era as compared to traditional copyright law’s emphasis on copying and performance rights).

⁵⁷ See Stephen B. Popernik, *The Creation of an “Access Right” in the Ninth Circuit’s Digital Copyright Jurisprudence*, 78 BROOK. L. REV. 697, 700 (2013) (“As consumer content moves to the ‘cloud,’ where the distinction between a copy and a performance is more likely to be invisible to the consumer, this access-based approach . . . provides an alternative to traditional infringement claims that is both more workable and better suited to the digital marketplace.”).

copyrighted material and distribute them via the Internet.⁵⁸ Copyright holders faced a “digital dilemma”⁵⁹: They could distribute their works easily and at minimal cost compared to older, physical media, but this opened the door for consumers to reproduce and distribute their copyrighted material almost at will, often without paying for it at all.⁶⁰ Copyright holders could use technology to block users from accessing their content without permission in the first place, but users would only find increasingly clever ways to get around those digital walls, creating an inefficient technological arms race.⁶¹

In order to ensure that copyright would be respected online, the DMCA included an anticircumvention provision. Section 1201(a) contains two separate bans: a ban on circumvention itself, found in § 1201(a)(1), and a ban on trafficking in circumvention technology, in § 1201(a)(2).⁶² This Note primarily addresses the applicability of the first ban, on individual users’ circumvention, to online paywalls.⁶³

The language of § 1201(a)(1) states: “No person shall circumvent a technological measure that effectively controls access to a work protected under [the Copyright Act].”⁶⁴ According to the statute, the phrase “circumvent a technological measure” means to “descramble a

⁵⁸ See Daniel S. Hurwitz, *A Proposal in Hindsight: Restoring Copyright’s Delicate Balance by Rewriting 17 U.S.C. § 1201*, 13 UCLA ENT. L. REV. 263, 265–66 (2006) (describing the differences between analog and digital means of reproduction and their import for copyright holders).

⁵⁹ PAUL HORN ET AL., COMM. FOR ECON. DEV., PROMOTING INNOVATION AND ECONOMIC GROWTH: THE SPECIAL PROBLEM OF DIGITAL INTELLECTUAL PROPERTY 1 (2004), available at http://msl1.mit.edu/furdlog/docs/2004-03-01_ced_report_digital_ip.pdf.

⁶⁰ See *id.* at 25–26 (noting how easy it is for customers of digital media to reproduce and redistribute content).

⁶¹ For a discussion of the technological arms race, see *infra* note 162 and accompanying text.

⁶² 17 U.S.C. § 1201(a)(1)–(2) (2012).

⁶³ The latter provision, § 1201(a)(2), prohibits distributing means of circumvention and has been the subject of significantly more litigation. See, e.g., *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 942 (9th Cir. 2010) (considering the application of § 1201(a)(2) to the case before it); *MGE UPS Sys., Inc. v. GE Consumer & Indus., Inc.*, 622 F.3d 361, 365–66 (5th Cir. 2010) (same); *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1194 (Fed. Cir. 2004) (same); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 440–41 (2d Cir. 2001) (same); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 316 (S.D.N.Y. 2000) (same), *aff’d sub nom.* *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001). This is likely because a person distributing ways of getting around an access-control measure poses a greater financial threat than an individual user. See *infra* Part III.C.2 (describing the inefficiency—and corresponding low likelihood—of copyright owners pursuing individual circumventers under § 1201(a)(1)). However, § 1201(a)(1) and § 1201(a)(2) are closely linked: The first bans circumvention of an access control, and the second bans trafficking in the means of accomplishing that circumvention. 17 U.S.C. § 1201(a)(1)–(2). As such, the cases interpreting § 1201(a)(2) will shed light on the applicability of § 1201(a)(1) to online paywalls.

⁶⁴ 17 U.S.C. § 1201(a)(1).

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.”⁶⁵ Of course, only technological protection measures that “effectively control access” to a copyrighted work are eligible for the anticircumvention provisions of § 1201(a). As defined by the statute, a technological protection measure effectively controls access “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.”⁶⁶ Essentially, a technological protection measure must serve as a gatekeeper for all access; after all, a locked back door can hardly be said to effectively control access to a house if its front door is wide open.⁶⁷

However, the *efficacy* of the technological protection measure is not at issue in § 1201(a). In other words, for a technological protection measure to qualify for § 1201(a), a copyright holder need not create a very good digital lock; he must only create a digital lock that a would-be intruder would need to encounter and circumvent in order to access the guarded copyrighted material.⁶⁸ What is at issue is determining the right of copyright owners that § 1201(a) ultimately aims to protect.

The next Part describes the two leading interpretations of the DMCA’s anticircumvention provision in § 1201(a): the access-right interpretation and the infringement-nexus interpretation.

II

THE TWO COMPETING INTERPRETATIONS: *BLIZZARD AND CHAMBERLAIN*

The legal and policy foundations of the access-right and infringement-nexus interpretations—as well as the distinctions between the two—are best illustrated by comparing the two leading cases of *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*,⁶⁹ where the Federal Circuit applied an infringement-nexus interpretation, and *MDY Industries, LLC v. Blizzard Entertainment*,

⁶⁵ *Id.* § 1201(a)(3)(A).

⁶⁶ *Id.* § 1201(a)(3)(B).

⁶⁷ See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 547 (6th Cir. 2004) (“Just as one would not say that a lock on the back door of a house ‘controls access’ to a house whose front door does not contain a lock . . . , it does not make sense to say that this provision of the DMCA applies to otherwise-readily-accessible copyrighted works.”).

⁶⁸ For further discussion of the statutory meaning of “effectively controls access,” see *infra* Part III.A.2.

⁶⁹ 381 F.3d 1178 (Fed. Cir. 2004).

Inc.,⁷⁰ where the Ninth Circuit embraced an access-right interpretation. The Federal Circuit's 2004 *Chamberlain* decision read a nexus requirement into the statute, requiring plaintiffs to show not just circumvention of an access protection measure, but also that the circumvention enabled or was reasonably related to a violation of traditional copyright's exclusive rights. By contrast, the Ninth Circuit's 2010 *Blizzard* decision read the statute, on its face, to reach the access-right interpretation, finding that mere circumvention of an access protection measure created liability under § 1201(a), without any connection to traditional copyright infringement.

Part II.A discusses the infringement-nexus interpretation, as illustrated in the *Chamberlain* decision, and shows that neither the text nor the legislative history supports this more widespread interpretation. Part II.B discusses the surprisingly rare access-right interpretation, as described in the *Blizzard* decision, and reveals how the Ninth Circuit's strict textualist interpretation is more faithful to congressional intent.

A. *The Infringement-Nexus Interpretation*

The infringement-nexus interpretation is best exemplified by the Federal Circuit's decision in *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*⁷¹ The Federal Circuit is not alone in applying this interpretation,⁷² but its clear articulation of the interpretation's rationale allows an examination of its logic and shortcomings.

In *Chamberlain*, the Federal Circuit read into the statute a nontextual infringement-nexus requirement, such that a plaintiff copyright owner would have to establish not only circumvention, but also that the circumvention caused or enabled traditional copyright infringement.⁷³ The Federal Circuit expressed grave concerns about the policy problems that a literal reading of the statute could create and concluded that Congress could not possibly have intended such a result.⁷⁴

1. *Statutory Language and Structure*

In *Chamberlain*, a manufacturer of garage door openers sued a manufacturer of aftermarket remote controls, alleging, inter alia, that

⁷⁰ 629 F.3d 928 (9th Cir. 2010).

⁷¹ 381 F.3d 1178.

⁷² See *supra* notes 8–10 and accompanying text (listing examples of courts that have applied the majority infringement-nexus interpretation).

⁷³ 381 F.3d at 1202.

⁷⁴ *Id.* at 1192 (citing *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 188 (1994)).

the defendant's products enabled circumvention of an access control that protected copyrighted software code.⁷⁵ Traditional copyright infringement was not alleged; unauthorized access was. Accordingly, the Federal Circuit interpreted 17 U.S.C. § 1201(a)(2) as requiring that a plaintiff show that the defendant's trafficking in circumvention technology bore a "reasonable relationship" to copyright owners' traditional protections under the Copyright Act.⁷⁶ Some have termed this an "ancillary action theory," arguing that Congress intended the section only to provide another cause of action to protect the existing exclusive rights of traditional copyright.⁷⁷

In applying the infringement-nexus interpretation, the *Chamberlain* court acknowledged that interpretation of a statute "must start with the language of the statute,"⁷⁸ and that where the language's meaning is plain, the inquiry ends. However, the court feared that the statute's language would lead to a result "so bizarre that Congress could not have intended it."⁷⁹ In particular, the Federal Circuit pointed to § 1201(c)(1), which states, "Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title."⁸⁰

In the Federal Circuit's view, the plain text of the statute cannot be interpreted literally without creating an internal contradiction between § 1201(a) and § 1201(c)(1). This, according to the Federal Circuit, would create a new right of access protection and affect substantive rights under copyright law.⁸¹ Instead, the *Chamberlain* court held that the DMCA does not create a new property *right* but only a new *cause of action*, offering a new way to protect only those rights already held by copyright owners.⁸² In other words, a copyright owner cannot hold a defendant liable for trafficking in a device that allows circumvention of an access protection measure unless that circumvention enables—or renders likely—an act of traditional copyright infringement.

The Federal Circuit also addressed the seeming redundancy that its infringement-nexus interpretation might appear to create between

⁷⁵ *Id.* at 1181–88.

⁷⁶ *Id.* at 1202.

⁷⁷ Arthur, *supra* note 15, at 276; Efroni, *supra* note 15, at 286.

⁷⁸ *Chamberlain*, 381 F.3d at 1192 (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 56 (1987)).

⁷⁹ *Id.* (quoting *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 188 (1994)).

⁸⁰ 17 U.S.C. § 1201(c)(1) (2012), *quoted in Chamberlain*, 381 F.3d at 1192.

⁸¹ *See Chamberlain*, 381 F.3d at 1192–93 (concluding that § 1201(c)(1) in effect indicates that violations of § 1201(a) are not copyright infringement in and of themselves).

⁸² *Id.*

§ 1201(a) and § 1201(b)(1).⁸³ The former subsection, according to the Federal Circuit, bans circumvention devices that enable access that in turn facilitates infringement; the latter subsection prohibits circumvention devices that *directly* facilitate infringement,⁸⁴ a distinction seemingly without a difference. Perhaps to counter arguments that its infringement-nexus interpretation renders the two subsections needlessly duplicative, *Chamberlain* draws a vanishingly fine line between the two subsections: In the Federal Circuit's view, § 1201(a) forbids circumventing a technological measure that prevents users from accessing a copyrighted work in order to copy it, while § 1201(b)(1) forbids circumventing a technological measure that allows access but prevents copying.⁸⁵ The Federal Circuit concluded that "access" cannot be separated from "protection."⁸⁶ As such, a plaintiff alleging a violation of § 1201(a)(1) or (a)(2) must demonstrate a link between access and infringement, the "critical nexus between access and protection."⁸⁷

2. Policy Arguments Supporting the Infringement-Nexus Interpretation

In applying the infringement-nexus interpretation, the Federal Circuit also expressed grave reservations about the policy implications of the alternate access-right interpretation. It was concerned that under the statute's plain text, copyright owners could use technological means to restrict access to copyrighted works for fair uses that do not infringe copyright, flouting the fair use doctrine in a way that would conflict with 17 U.S.C. § 1201(c)(1).⁸⁸

⁸³ *Id.* at 1199–200.

⁸⁴ *See* 17 U.S.C. § 1201(b)(1) (prohibiting devices that circumvent a technological protection measure that "effectively protects a right of a copyright owner under [the Copyright Act]"), *quoted in Chamberlain*, 381 F.3d at 1195 n.12. Professor David Nimmer characterizes § 1201(a) as aimed at unauthorized access, while § 1201(b)(1) is aimed at unauthorized copying. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12A.03[D][3] & n.175 (Matthew Bender rev. ed. 2014). On this subject, the Second Circuit spoke plainly: "[B]oth subsections prohibit trafficking in a circumvention technology, [but] the 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 . . . some . . . act that infringes a copyright.*" *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 441 (2d Cir. 2001).

⁸⁵ *Chamberlain*, 381 F.3d at 1199 (citing *Corley*, 273 F.3d at 441).

⁸⁶ *See id.* at 1197 ("[I]t is significant that virtually every clause of § 1201 that mentions 'access' links 'access' to 'protection.'").

⁸⁷ *Id.* at 1204; *see also id.* at 1197 (drawing support from *Corley* to explain that, by passing the DMCA, Congress intended "to help copyright owners protect their works *from piracy* behind a digital wall" (citing *Corley*, 273 F.3d at 435)).

⁸⁸ *Id.* at 1202; *see supra* note 80 and accompanying text (explaining that the statute does not impact rights or remedies, "including fair use," under the Copyright Act (quoting 17 U.S.C. § 1201(c)(1) (2012))).

The *Chamberlain* court further reasoned that reading the statute without a nexus to infringement would create “broad policy implications . . . [that] are both absurd and disastrous”.⁸⁹

Under [the plaintiff’s] proposed construction, explicated at oral argument, disabling a burglar alarm to gain “access” to a home containing copyrighted books, music, art, and periodicals would violate the DMCA; anyone who did so would unquestionably have “circumvent[ed] a technological measure that effectively controls access to a work protected under [the Copyright Act].”⁹⁰

Courts’ reluctance to apply a broad interpretation may be due in part to concerns about interoperability and aftermarket accessories, which feature prominently in several key cases.⁹¹ The *Chamberlain* court was clearly concerned about the risk of anticompetitive abuses of the anticircumvention provision, fearing that companies would use it to drive out competitors by suing over circumvention when their real concern was losing market share. Courts confronting the application of the DMCA to interoperability contexts would surely reason that Congress intended the statute to apply in the context of literature, music, and art, not toner cartridges and garage door openers.⁹²

⁸⁹ *Chamberlain*, 381 F.3d at 1200–01.

⁹⁰ *Id.* at 1201 (second and third alterations in original) (quoting 17 U.S.C. § 1201(a)(1)). While that application of the statute may appear ridiculous, it closely reflects an analogy employed in the House Report on the bill: “The act of circumventing a technological protection measure put in place by a copyright owner to control access to a copyrighted work is the electronic equivalent of breaking into a locked room in order to obtain a copy of a book.” H.R. REP. NO. 105-551, pt. 1, at 17 (1998); *see also* 4 NIMMER & NIMMER, *supra* note 84, § 12A.03[D][1] (describing violations of § 1201(a)(1) as “equivalent to breaking into a castle” and § 1201(a)(2) as targeting those who facilitate breaking into a castle—“say, those who market siege engines or catapults”). This tends to undermine the Federal Circuit’s position that Congress could not have intended such a result.

⁹¹ *See, e.g., Chamberlain*, 381 F.3d at 1201 (citing *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 455 (1992); *Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640, 647 (7th Cir. 2003)) (“[The plaintiff’s] construction of the DMCA would allow virtually any company to attempt to leverage its sales into aftermarket monopolies—a practice that both the antitrust laws and the doctrine of copyright misuse normally prohibit.” (citations omitted)); Alicia Hoffer, *A Matter of Access: How Bypassing DRM Does Not Always Violate the DMCA*, 7 WASH. J.L. TECH. & ARTS 13, 24 (2011) (discussing courts’ reluctance to apply the DMCA broadly to cases involving copyrighted code components of manufactured goods, as opposed to more expressive digital media); *see also* Czolacz, *supra* note 15, at 442 (arguing for a more restrictive statutory definition of “access” that “excludes purely mechanical interaction between technologies, which facilitates interoperability, but does not result in individuals gaining audio or visual access to copyrighted material”).

⁹² *See* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 547 (6th Cir. 2004) (discussing the applicability of § 1201 to printer cartridge access protections); *Chamberlain*, 381 F.3d at 1201 (discussing problematic applications of the DMCA in the context of garage door openers). One commentator has suggested that the DMCA’s applicability may soon expand to instant coffee pods. Cory Doctorow, *Why DRM’ed*

To expand on the court's own metaphor, this application of the statute would punish people not only for breaking into a locked room to steal a book, but also for breaking in to steal jewels from a locked room that also happens to contain a book.⁹³

Finally, the court raised concerns about the constitutionality of the anticircumvention provision in the absence of a nexus to infringement. The court, for example, reiterated *Eldred v. Ashcroft*'s requirement that "Congress' exercise of its Copyright Clause authority . . . be rational" in deciding what rights to grant authors "to give the public appropriate access to their work product."⁹⁴ Allowing copyright owners unfettered control over public access to their works, even to the point of denying the public any access to those works, cannot, in the Federal Circuit's view, be a rational means of "giv[ing] the public appropriate access."⁹⁵

The Federal Circuit's policy concerns were not unfounded.⁹⁶ The Federal Circuit is not alone in its concerns, nor is it alone in its adoption of an infringement-nexus interpretation.⁹⁷ However, as the discussion of the access-right interpretation in the next Subpart indicates, the nexus between circumvention and infringement is neither textually justified nor logically necessary.

B. *The Access-Right Interpretation*

In *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, the Ninth Circuit considered the DMCA's anticircumvention provisions as applied to a computer program designed to help World of Warcraft players automate gameplay and advance quickly in the game.⁹⁸ The Ninth Circuit applied an interpretation of the statute that is, to date,

Coffee-Pods May Be Just the Awful Stupidity We Need, BOING BOING (Mar. 6, 2014, 6:54 AM), <http://boingboing.net/2014/03/06/why-adrmed-coffee-pods-may-b.html>.

⁹³ I thank Professor Christopher Sprigman for this analogy.

⁹⁴ *Chamberlain*, 381 F.3d at 1200 (emphasis omitted) (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 205 & n.10 (2003)); see also *Golan v. Holder*, 132 S. Ct. 873, 890 (2012) (discussing the *Eldred* decision's interpretation of the "traditional contours" of copyright's protections for free speech, namely, fair use and the idea/expression dichotomy); *Czolacz*, *supra* note 15, at 455 (arguing that reading the anticircumvention provision as requiring no nexus to copyright infringement "alters the contours of copyright law dramatically by giving the creators of copyrighted materials who employ technological measures to protect those materials a right against unwanted interaction with any product that circumvents those protections").

⁹⁵ *Chamberlain*, 381 F.3d at 1200.

⁹⁶ See discussion *infra* Part III.C (highlighting problems with the access-right interpretation of the DMCA).

⁹⁷ See *supra* notes 8–10 and accompanying text (listing courts that have applied the majority infringement-nexus interpretation).

⁹⁸ *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 934–36 (9th Cir. 2010).

unique.⁹⁹ The court read § 1201(a) as imposing a prohibition on circumvention of effective technological means of controlling access to copyrighted works, without any reference to whether such circumvention is related to copyright infringement. The court bolstered its plain-text reading by drawing on the legislative history to infer congressional intent supporting a new right of access protection.

1. Textual Support for the Access-Right Interpretation

The Ninth Circuit held that 17 U.S.C. § 1201(a) means what it says: It forbids circumvention of an access protection measure.¹⁰⁰ Like the Federal Circuit in *Chamberlain*, the *Blizzard* court focused on § 1201(a)(2), which bans trafficking in devices that enable circumvention of access controls.¹⁰¹ Looking to the plain text of the statute, the Ninth Circuit found that no nexus to traditional copyright is required by the statute; the act of circumvention is enough in itself.¹⁰²

The court's analysis applied the most straightforward meaning of the text of § 1201(a)(2): The distribution of technology designed to bypass technological access protections placed on copyrighted materials is prohibited.¹⁰³ Nowhere in the text appears a requirement that these technological protections, or the means by which they are circumvented, bear any connection to the exclusive rights enumerated in 17 U.S.C. § 106.

In addition to the language of § 1201(a)(2), the *Blizzard* court found that the structure of § 1201, when considered as a whole, reflects the intention of Congress to create two distinct sets of claims:

⁹⁹ Other circuits have made statements in dicta that appear to support the access-right interpretation, but no other circuit has reached the Ninth Circuit's holding. *See, e.g.*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001) (suggesting that the DMCA “targets the *circumvention* of digital walls guarding copyrighted material (and trafficking in circumvention tools), but does not concern itself with the *use* of those materials after circumvention has occurred”); *see also* *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 300 (3d Cir. 2011) (indicating that § 1201(a)(1)(A) creates a separate cause of action for circumventing the encryption on a DVD, apart from the more traditional copyright infringement action for making copies of that DVD); *MGE UPS Sys., Inc. v. GE Consumer & Indus., Inc.*, 622 F.3d 361, 366 (5th Cir. 2010) (“Because § 1201(a)(1) is targeted at circumvention, it does not apply to the use of copyrighted works *after* the technological measure has been circumvented.”).

¹⁰⁰ *Blizzard*, 629 F.3d at 952.

¹⁰¹ This section is the close counterpart to § 1201(a)(1), and the question addressed by the Ninth Circuit in *Blizzard* is equally relevant to § 1201(a)(1) and § 1201(a)(2), namely, whether the anticircumvention provision requires a nexus to traditional copyright infringement in order for circumvention liability to attach. For a discussion of the similarities between § 1201(a)(1) and § 1201(a)(2), and the applicability of cases interpreting the latter to an analysis of the former, see *supra* note 63.

¹⁰² *Blizzard*, 629 F.3d at 952.

¹⁰³ *Id.* at 950.

claims for circumventing access controls and claims for circumventing controls that protect copyrights.¹⁰⁴

The language of § 1201(a) explicitly—and exclusively—prohibits circumvention of a technological measure that controls access to a copyrighted work.¹⁰⁵ In distinct contrast, the language of § 1201(b)(1) prohibits distributing devices that circumvent a technological measure that “protects a right of a copyright owner,” that is, a technological measure that prevents infringement of traditional copyright.¹⁰⁶ Under standard rules of statutory construction, different language reflects a different meaning,¹⁰⁷ and “if possible each word should be given some effect.”¹⁰⁸ Because Congress used different language to describe the two different circumvention protections, the *Blizzard* court assumed that the two provisions mean different things: § 1201(b) protects traditional rights of copyright holders, while § 1201(a) protects the new and distinct access right.¹⁰⁹

Furthermore, as the *Blizzard* court noted, § 1201(a) prohibits both trafficking in access-control circumvention devices and access-control circumvention itself, whereas § 1201(b) prohibits only trafficking in copyright-protection circumvention devices, and not using those devices to circumvent copyright-protection technology.¹¹⁰ In other words, § 1201(a)(2) and § 1201(b)(1) mirror each other: The first targets those who distribute circumvention devices that enable access, while the second targets those who distribute circumvention devices that enable copyright infringement. But while § 1201(a)(1) targets individual acts of gaining access by circumvention, there is no parallel subsection of § 1201(b) targeting those who infringe copyright by circumvention.

This absence of a parallel subsection in § 1201(b) highlights the different purposes of § 1201(a) and § 1201(b). Section 1201(b) protects traditional copyright, not the new access right, and so there is no need to specifically target individuals who infringe copyright by circumvention because infringement is already prohibited by traditional copyright law in 17 U.S.C. § 106.¹¹¹ Consequently, § 1201(b) contains

¹⁰⁴ *Id.* at 944.

¹⁰⁵ 17 U.S.C. § 1201(a) (2012); see *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 441 (2d Cir. 2001) (distinguishing § 1201(a) from § 1201(b)(1) by explaining that the former focuses on illicit access, while the latter focuses on illicit copying).

¹⁰⁶ 17 U.S.C. § 1201(b)(1).

¹⁰⁷ WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 834 (3d ed. 2001).

¹⁰⁸ *Moskal v. United States*, 498 U.S. 103, 120 (1990) (Scalia, J., dissenting).

¹⁰⁹ *Blizzard*, 629 F.3d at 944–45.

¹¹⁰ *Id.* at 944.

¹¹¹ *Id.* at 945 (citing S. REP. NO. 105-190, at 11 (1998)).

only a ban on trafficking in devices that circumvent copy protections. In contrast, § 1201(a) bans both trafficking in and using devices that circumvent access-control measures. The need for the additional prohibition indicates that § 1201(a) grants a new access right that is distinct from traditional copyright.

Accordingly, the most logical and textually faithful reading of § 1201(a) and § 1201(b)(1) is that § 1201(a) forbids circumvention of access controls, while § 1201(b)(1) forbids trafficking in methods of circumventing copyright protection. Professor David Nimmer, for example, aptly describes the first as “breaking into a castle—the invasion of another’s property is itself the offense”¹¹²—while the second is more akin to helping an invited guest break the rules once inside the castle. He draws on the House Report on the DMCA for this conclusion: “[Section 1201(a)] is inapplicable to ‘the subsequent actions of a person once he or she has obtained authorized access to a copy of a work protected under Title 17, even if such actions involve circumvention of additional forms of technological protection measures.’”¹¹³ If the best reading of the statute is to give distinct meaning to both § 1201(a) and § 1201(b)(1), then the first must be understood as protecting access without a required nexus to infringement.

2. Structural Support in the User-Privacy Provision of § 1201(i)

One of the strongest indications of congressional intent lies in 17 U.S.C. § 1201(i). Section 1201(i) provides an exemption that allows users to circumvent cookie storage,¹¹⁴ but the exemption is very narrow and allows only circumvention that protects user privacy.¹¹⁵

Websites use cookies to collect and track information about their users. They can track how long a user spends on a site, how many times she visits, where she arrives from, and where she goes after her visit.¹¹⁶ Cookies can track items a user peruses at one website and present ads for the same kind of goods on other websites.¹¹⁷ Congress, concerned about user privacy, adopted § 1201(i) to ensure that users

¹¹² 4 NIMMER & NIMMER, *supra* note 84, § 12A.03[D][1] (footnote omitted).

¹¹³ *Id.* § 12A.03[D][2] (quoting H.R. REP. NO. 105-551, pt. 1, at 18 (1998)).

¹¹⁴ *See id.* § 12A.05[B][1] (describing § 1201(i)).

¹¹⁵ 17 U.S.C. § 1201(i)(1)(C) (2012).

¹¹⁶ David Nimmer, *Aus Der Neuen Welt*, 93 Nw. U. L. REV. 195, 206 (1998) (“[T]he webmaster can determine what files, pictures, or other information you are most interested in (and what you ignored), how long you examined a particular page, image or file, where you came from, where you went to.” (citation omitted)).

¹¹⁷ Michael Learmonth, *The Pants that Stalked Me on the Web*, ADVERTISING AGE (Aug. 2, 2010), <http://adage.com/article/digitalnext/pants-stalked-web/145204/>.

had some legal ability to refuse to accept cookies.¹¹⁸ However, the user protection in § 1201(i) is paper-thin, and reveals much more about what users may *not* do than what they *may* do.

Section 1201(i) allows users to circumvent technological protection measures that collect personal data—in other words, to delete or disable cookies. But that exemption only applies under a very narrow set of circumstances. A user may only circumvent a website’s technological protection measure if (1) the measure is capable of collecting personal information, (2) the measure collects personal information without notice to users and without the ability for users to opt out of that collection, (3) the act of circumvention has the “sole effect” of disabling the information collection and “has no other effect on the ability of any person to gain access to any work,” and (4) the act of circumvention is only carried out for the purpose of preventing the collection of personal information.¹¹⁹

Though § 1201(i) was intended to protect user privacy, the strict conditions that must be satisfied before the user can lawfully circumvent a cookie likely mean that users will rarely be able to take advantage of this defense. For example, when a website provides notice that it uses cookies that collect personal data, this closes the door on § 1201(i): Users cannot both continue to use the website and lawfully avoid or prevent the use of cookies. The subsection effectively mandates that users accept cookies, apparently indefinitely, at the behest of website owners. As Professor David Nimmer has observed, “The topsy-turvy upshot . . . seems to be that, if a consumer receives disclosure about a cookie, then she may not disable it; if she does not receive disclosure, then she may lawfully disable.”¹²⁰

Although § 1201(i)’s generous conditions for website owners render it toothless at best as a tool to protect user privacy, it is nonetheless a powerful indicator of congressional intent. The language of the section makes clear that Congress generally did not intend that users be able to circumvent technological protection measures such as cookies in order to access copyrighted materials. The language of

¹¹⁸ See, e.g., 144 CONG. REC. 18,781 (1998) (“We do not want corporations being able to insinuate themselves into the privacy of Americans, finding out where they go, what they do, as they use these new software technologies.” (statement of Rep. Markey)); *id.* at 18,775 (advocating “provisions that protect personal privacy by clearly permitting personal computer owners to disable cookies” (statement of Rep. Boucher)); see also S. REP. NO. 105-190, at 18 (1998) (“[The] enactment of section 1201 should have a positive impact on the protection of personal privacy on the Internet. The same technologies that copyright owners use to control access to and use of their works can and will be used to protect the personal privacy of Internet users . . .”).

¹¹⁹ 17 U.S.C. § 1201(i).

¹²⁰ 4 NIMMER & NIMMER, *supra* note 84, § 12A.05[B][2] (footnote omitted).

§ 1201(i) emphasizes repeatedly that it concerns circumvention that aims “to gain access to the work protected.”¹²¹ And because § 1201(i) expressly offers an exception to the circumvention ban in § 1201(a)(1)(A),¹²² we can infer that circumvention that does not fall within the narrow safety zone of § 1201(i) is forbidden by § 1201(a)(1)(A). In short, circumvention that enables “gain[ing] access” to a work is sufficient to violate the statute without a nexus to infringement.

3. *Support for the Access-Right Interpretation in the Legislative History*

The DMCA’s legislative history offers further support for the access-right interpretation. In adopting the DMCA, Congress hoped to balance the needs of “content creators and information users.”¹²³ The *Blizzard* court recognized that this balance, in the context of a new Internet economy, must protect a right of access for copyright owners.¹²⁴ Indeed, the Senate Judiciary Committee explained that before the enactment of the DMCA, “the conduct of circumvention was never before made unlawful,” and the bar on trafficking in access-control circumvention devices “enforces this *new prohibition* on conduct.”¹²⁵ The House Commerce Committee reflected a similar understanding of the new right of access protection as “separate from, and cumulative to, the existing claims available to copyright owners.”¹²⁶ Access to copyrighted works was therefore a right that Congress recognized as valuable and worth protecting in the DMCA’s statutory provisions.

The next Part analyzes the applicability of this legislatively grounded right of access to digital paywalls specifically.

III

APPLYING THE ACCESS-RIGHT INTERPRETATION TO THE DIGITAL PAYWALL

This Part applies the access-right interpretation of 17 U.S.C. § 1201(a)(1) to the hypothetical paywall introduced at the start of this

¹²¹ 17 U.S.C. § 1201(i)(1) (referring multiple times to “gain[ing] access” to copyrighted works).

¹²² *Id.*

¹²³ *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1196 (Fed. Cir. 2004) (quoting H.R. REP. NO. 105-551, pt. 2, at 26 (1998)).

¹²⁴ *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 945 (9th Cir. 2010).

¹²⁵ S. REP. NO. 105-190, at 11 (1998) (emphasis added), *quoted in Blizzard*, 629 F.3d at 945.

¹²⁶ H.R. REP. NO. 105-551, pt. 2, at 24.

Note. The discussion in Part III.A demonstrates that, under this interpretation, the DMCA's various statutory exemptions do not excuse the circumvention of the paywall. Part III.B then describes the problems that application of the access-right interpretation presents.

A. *Applying the Access-Right Interpretation*

Under the access-right interpretation, a plaintiff need not show that a circumventer has done anything more than get around an access control.¹²⁷ As the first case explicitly adopting this interpretation, *Blizzard* offers its own set of elements for trafficking violations of § 1201(a)(2). It states that a defendant is liable if he “(1) traffics in (2) a technology or part thereof (3) that is primarily designed, produced, or marketed for, or has limited commercially significant use other than (4) circumventing a technological measure (5) that effectively controls access (6) to a copyrighted work.”¹²⁸ Because there can be no trafficking liability without facilitating underlying individual circumvention,¹²⁹ these elements are easily adapted to reveal the Ninth Circuit's interpretation of individual circumvention under § 1201(a)(1). The first three elements specifically concern trafficking in access-control circumvention technology, so only the last three elements set the standard for individual circumvention liability. The next three Subparts consider each of these elements in the context of paywalls.

1. *“Circumventing a Technological Measure”*

There is no question that a newspaper paywall is a technological measure. Digital paywalls are, by definition, technological; they are constructed of programmed computer code.¹³⁰ The more difficult question, then, is when a user's access constitutes circumvention under the DMCA.

The text of the statute answers that question with a broad definition of circumvention that encompasses essentially every possible way of accessing content behind a paywall. Section 1201(a)(3)(A) provides that “circumvent[ing] a technological measure” means “to descramble a scrambled work, to decrypt an encrypted work, or otherwise to

¹²⁷ See *supra* Part II.B (discussing the textual, structural, and historical support for this interpretation).

¹²⁸ *Blizzard*, 629 F.3d at 953.

¹²⁹ See 4 NIMMER & NIMMER, *supra* note 84, § 12A.03[B] (“[T]he definitions of ‘circumvent a technological measure’ and ‘effectively controls access to a work’ that were reviewed in the context of the [individual anticircumvention] provision apply [to the antitrafficking provision] as well.” (footnote omitted)).

¹³⁰ See *supra* Part I.A.2 (describing paywall technology).

avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.”¹³¹ The language is so sweeping that any means of accessing the paywall-protected content without authorization would arguably fit within at least one of the verbs listed in the provision. Deleting cookies, using ad-blocking software, or other routes past the paywall could be said to “deactivate” or “impair” the paywall protecting the online news article.¹³²

2. “That Effectively Controls Access”

Can the paywall “effectively control” access to a copyrighted work if it can be easily circumvented? Once again, the statutory definition is instructive: “[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.”¹³³ Because the paywall would require the application of information (such as a password or a cookie) as authorized by the owner in order to gain access to the work, the paywall effectively controls access to the work.

What about the possibility of reading the text of the article by viewing the source HTML code for the page? The *Blizzard* court addressed such a possibility in part by drawing a distinction from the case *Lexmark International, Inc. v. Static Control Components, Inc.*¹³⁴ In *Lexmark*, the Sixth Circuit held that a printer’s authorization sequence did not “effectively control access” to the underlying copyrighted code because a user could read the source code directly from the program memory itself.¹³⁵ The authorization sequence controlled one route of access (using the printer), but it left unguarded another (the ability to view the literal code from the program memory).¹³⁶

¹³¹ 17 U.S.C. § 1201(a)(3)(A) (2012).

¹³² This Note does not describe in detail the various means of circumventing digital paywalls, *see supra* note 41 (explaining this decision), but the expansive list of verbs in § 1201(a)(3)(A) is sufficiently broad to capture many, if not all, of these methods.

¹³³ 17 U.S.C. § 1201(a)(3)(B).

¹³⁴ *Blizzard*, 629 F.3d at 952–53 (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 547 (6th Cir. 2004)) (restating that blocking one means of accessing a copyrighted work is not sufficient to trigger DMCA protection when other access avenues remain open).

¹³⁵ *See Lexmark*, 387 F.3d at 546 (“Anyone who buys a Lexmark printer may read the literal code of the Printer Engine Program directly from the printer memory, with or without the benefit of the authentication sequence, and the data from the program may be translated into readable source code after which copies may be freely distributed.”).

¹³⁶ *Id.* at 547 (“No security device, in other words, protects access to the Printer Engine Program Code and no security device accordingly must be circumvented to obtain access to that program code.”).

Applying the access-right interpretation illuminates the distinction between the different copyrights that may simultaneously exist in one online news article: the copyrighted HTML code, the copyrighted article text, and the copyrighted visual display created by the code on the browser's screen.¹³⁷ A user could gain access to the HTML code without circumventing a paywall by viewing the source code directly; indeed, the user could even access the copyrighted article text in the same way if the text appears directly in the HTML code. However, a protectable copyright would still persist in the visual display created by the code, and users would not be able to view that display without somehow circumventing the paywall. The paywall therefore "effectively controls access" to at least the copyright in the visual display.

3. "To a Copyrighted Work"

The copyright owner would find little difficulty in establishing that the news article is protected by copyright,¹³⁸ satisfying the third and final element of the *Blizzard* rule for finding liability under § 1201(a)(1).

B. *The Value of the Access Right*

This hypothetical, simple as it may be, demonstrates that access itself—in the absence of copyright infringement—is valuable, and that copyright owners may seek to protect access to their works online in particular.

This understanding is at the core of the DMCA's anti-circumvention provision, which itself has been described as "the heart of the Digital Millennium Copyright Act."¹³⁹ If Congress hopes to encourage copyright owners to make their works more widely available on the Internet, access protection is a necessary tool to counteract the ease and rapidity of generating limitless high-quality copies of digital content.¹⁴⁰ The *Chamberlain* court, in applying the infringement-nexus interpretation, found it implausible that Congress could rationally pursue the goal of encouraging copyright owners to provide the public with appropriate access to their works by granting

¹³⁷ See *Blizzard*, 629 F.3d at 953–54 (citing *Atari Games Corp. v. Oman*, 888 F.2d 878, 884–85 (D.C. Cir. 1989)) (noting that an audiovisual display created by a computer code is copyrightable independent of the code itself).

¹³⁸ See 17 U.S.C. § 101 (2012) (defining "[l]iterary works").

¹³⁹ David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 704 (2000); see also Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 414–15 (1999) (describing the prohibitions on circumvention as central to the DMCA).

¹⁴⁰ See Ginsburg, *Access Right*, *supra* note 15, at 118 (describing the unique value of access rights as distinct from copyright).

them the right to deny the public any and all access.¹⁴¹ In doing so, the *Chamberlain* court failed to appreciate that in the digital age, access itself can have value independent of the generation or distribution of copies.¹⁴²

The access-right interpretation as outlined in the *Blizzard* court's decision, by contrast, would allow copyright owners to harness the Internet's powerful capacity for making and distributing high-quality copies at minimal cost and to charge consumers for access to the copies. The success of the *New York Times* paywall and the proliferation of newspaper paywalls around the world¹⁴³ demonstrate the value of access and why the access-right interpretation is better suited to this market. Congress rationally exercised the powers conferred by the Copyright Clause when it granted copyright owners an exclusive right to manage access to their works, thereby generally, if indirectly, improving public access by incentivizing online distribution. But placing a premium on access, as embraced by the access-right interpretation, is not without its own problems. The next Subpart considers these issues in detail.

C. Problems Revealed by Applying § 1201(a) to Paywalls

Despite the fact that § 1201(a) reflects a rational exercise of Congress's copyright powers, the application of § 1201(a) to paywalls demonstrates that significant policy problems remain. First, the anticircumvention provision is overbroad, failing to distinguish between innocent behavior and intentional circumvention. Furthermore, the statute does not provide an economically viable cause of action against individual users, suggesting that—at least in the context of paywalls—the liability imposed by the statute will be neither feared by circumventers nor wielded by copyright owners.

1. Overbreadth Problems

The interpretation of § 1201(a) espoused in *Blizzard*, while logically sound, nevertheless proves overbroad because it encompasses innocent as well as culpable behavior. Specifically, the statute lacks an intent requirement; individuals who innocently and even unknowingly circumvent an access protection face the same liability as those who

¹⁴¹ See *supra* notes 94–95 (discussing *Chamberlain*'s reasoning that granting copyright owners the right to deny access could not possibly constitute a rational use of Congress's Copyright Clause powers).

¹⁴² See Ginsburg, *Access Right*, *supra* note 15, at 118 (describing the central role that prohibitions on circumvention play in the DMCA).

¹⁴³ See Pfanner, *supra* note 23 (describing the adoption of various paywall models in Asia, North America, and Europe).

do so purposefully. For example, some users object to the storage of cookies on their computers on privacy grounds, as the depth and breadth of the monitoring that cookies enable can be somewhat unsettling.¹⁴⁴ But cookies feature prominently in the function of many online paywalls,¹⁴⁵ and a user's refusal to accept any cookies might cause a paywall to grant him access that it would normally disallow. Because § 1201(a) lacks an intent requirement, it may impose liability on users who access paywall-protected works without *ever* enabling cookies on their browsers, not only those who intentionally delete cookies for the purpose of accessing copyrighted content without permission.¹⁴⁶

The implications of this overbroad provision are troubling, especially for users' privacy and ability to use their personal computers as they see fit. In effect, the DMCA codifies a requirement that users submit to cookie storage in order to gain access to certain copyrighted material. While it may be fair to require users to allow access-protection technology to function properly, it is alarming that a user must either accept cookies he does not want or risk violating federal copyright law in the course of innocently browsing the Internet.

2. *Economic Inefficiency of Suits Against Individuals*

While it is unclear whether legal protection for access controls discourages would-be circumventers, it is certainly clear that enforcing § 1201(a)(1) against individual users is cost prohibitive. A copyright owner would have to develop and monitor sophisticated detection systems to identify individual circumventers before bringing costly litigation against them. The statute provides for actual damages,¹⁴⁷ statutory damages,¹⁴⁸ and potential treble damages for repeat violations.¹⁴⁹ But the expense of litigation, paired with the opportunity for judges to reduce fines on unwitting violators,¹⁵⁰ means that the anti-circumvention provision will be rarely enforced against individual

¹⁴⁴ Joseph Newman, Note, *Cookie Monsters: Locally Stored Objects, User Privacy, and Section 1201 of the DMCA*, 41 AIPLA Q.J. 511, 515 (2013).

¹⁴⁵ Among the websites using cookies as part of their paywall functions are WSJ.com, NYTimes.com, WashPost.com, and LATimes.com, to name just a few.

¹⁴⁶ See *supra* notes 114–22 and accompanying text (describing the DMCA's narrow user exemption that permits blocking cookies and explaining why it likely would not apply to most paywall users).

¹⁴⁷ 17 U.S.C. § 1203(c)(2) (2012).

¹⁴⁸ *Id.* § 1203(c)(3). Statutory damages are capped at \$2500 for each individual violation of this provision. *Id.*

¹⁴⁹ *Id.* § 1203(c)(4).

¹⁵⁰ *Id.* § 1203(c)(5).

users.¹⁵¹ Consequently, what the anticircumvention provision will practically be able to achieve with respect to individual violators is limited.

Accepting that protecting the right of access is the ultimate goal of the DMCA, Part IV considers statutory and alternative solutions to address the problems revealed by applying § 1201(a) to paywalls.

IV

PROTECTING THE RIGHT OF ACCESS

The obvious and perhaps necessary solution for addressing concerns about the statute's threat to privacy, overbreadth, and inefficiency is a legislative one, as discussed in Part IV.A. The alternative solution, discussed in Part IV.B, is to allow the market and social norms to continue to develop, and to intercede only if no efficient solution emerges. Part IV.C discusses some limitations inherent in those alternatives and concludes that a combination of the two solutions would be most appropriate.

A. Statutory Revision

The most obvious—but perhaps least practicable—solution to the problems of privacy, overbreadth, and enforceability would be amending the statute to better pursue the goal of providing meaningful access protection for digital works.

A number of proposals have been presented to Congress, including the repeal of the anticircumvention provision altogether.¹⁵² Alternatively, Representative Zoe Lofgren has introduced a bill called the Unlocking Technology Act of 2013, which would effectively codify the *Chamberlain* rule by adding an explicit infringement-nexus requirement to 17 U.S.C. § 1201(a)(1)(A).¹⁵³ However, these sugges-

¹⁵¹ Comparatively, the ban against trafficking in circumvention devices, *id.* § 1201(a)(2), has already generated, and will likely continue to generate, litigation. The costs of detecting individuals who offer circumvention methods to the public are lower; furthermore, such individuals are likely to take a larger bite out of copyright holders' bottom lines, making litigation a more attractive option. *See supra* note 63 (describing the higher proportion of § 1201(a)(2) litigation).

¹⁵² Benj Edwards, *The Copyright Rule We Need to Repeal if We Want to Preserve Our Cultural Heritage*, ATLANTIC (Mar. 15, 2013, 11:34 AM), <http://www.theatlantic.com/technology/archive/2013/03/the-copyright-rule-we-need-to-repeal-if-we-want-to-preserve-our-cultural-heritage/274049/> (arguing that the anticircumvention provision should be repealed to enable, among other things, the preservation of works of cultural significance).

¹⁵³ Unlocking Technology Act of 2013, H.R. 1892, 113th Cong. § 2(a) (2013). This approach is also advocated by Fix the DMCA, an online campaign to amend the DMCA that enjoys broad support from such Internet and technology companies as Reddit, Boing

tions fail to preserve the core function of the anticircumvention provision—namely, protecting access to online copyrighted works.

Another option that preserves that core function is redefining “access” under the statute as “sensory access by an individual.”¹⁵⁴ This revision would still implicate willful paywall circumventers like the hypothetical Linus, discussed at the beginning of this Note. And it eliminates the problems that concerned the *Chamberlain* court in the context of aftermarket accessories and interoperability cases.¹⁵⁵

In the alternative, the DMCA could be amended to redefine which “work[s] protected by this title”¹⁵⁶ are subject to anti-circumvention protection. In general, the DMCA has been interpreted more broadly when applied to digital media than when applied to the copyrighted software components of manufactured goods.¹⁵⁷ Nevertheless, the argument that the DMCA was intended to apply only to digital media, rather than to copyrighted components of goods, has been unavailing in the courts,¹⁵⁸ as traditional copyright law draws no meaningful distinction between the two.¹⁵⁹ However, a carefully drafted amendment could draw a distinction, either by narrowing the scope of applicable works or by exempting copyrighted components necessary to the function of a machine or other manufactured good.

Still other options include inserting a requisite level of intent to protect innocent or unknowing circumventers, strengthening the user-

Boing, and Mozilla, as well as the Electronic Frontier Foundation. Fix DMCA, <http://www.fixthedmca.org> (last visited Feb. 10, 2015).

¹⁵⁴ Czolacz, *supra* note 15, at 452; *see also id.* at 442 (suggesting the statutory amendment).

¹⁵⁵ *See Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1201 (Fed. Cir. 2004) (citing *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 455 (1992); *Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640, 647 (7th Cir. 2003)) (“[The plaintiff’s] construction of the DMCA would allow virtually any company to attempt to leverage its sales into aftermarket monopolies—a practice that both the antitrust laws and the doctrine of copyright misuse normally prohibit.” (citations omitted)); *see also* Czolacz, *supra* note 15, at 442 (arguing for a more restrictive statutory definition of “access” that “excludes purely mechanical interaction between technologies, which facilitates interoperability, but does not result in individuals gaining audio or visual access to copyrighted material”).

¹⁵⁶ 17 U.S.C. § 1201(a)(1)(A).

¹⁵⁷ *See Hoffer, supra* note 91, at 24 (“[P]rotection is more likely when DRM is used with copyrighted digital content than with traditional manufactured products.”).

¹⁵⁸ *See, e.g.*, June M. Besek, *Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts*, 27 COLUM. J.L. & ARTS 385, 411 (2004) (“Static Control argued that the DMCA was intended to protect copyrighted works that have independent market value. The court, however, refused to read such a limitation into § 1201(a)(2) . . .”).

¹⁵⁹ *See, e.g.*, *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1249 (3d Cir. 1983) (“[A] computer program . . . is a ‘literary work’ and is protected from unauthorized copying . . .”).

privacy provision in § 1201(i), and statutorily clarifying the relationship between the DMCA and traditional copyright limitations, particularly fair use.¹⁶⁰

B. *Nonstatutory Solutions*

Other options for pursuing meaningful access protection for digital content might be found in the market forces of technology or basic social norms.

1. *Technology and the Market*

The market's development of technology to optimize access control is an ongoing process that will likely continue, as developing new technological fixes is generally cheaper than going to court.¹⁶¹ The DMCA sought to put an end to the "technological arms race" by obviating inefficient investment in escalating self-help responses to piracy.¹⁶² But the best and most robust response to the DMCA's hapless protections for access control may be the Internet's own market mechanisms. Copyright owners can determine the optimal level of circumvention and tighten or loosen their digital locks to ensure profitability. After all, even when a user dodges paying a required fee for copyrighted content, the user may still generate income for the website by viewing advertisements and driving other users to the site through social media.

2. *Social Norms*

Another alternative to the DMCA's anticircumvention provision is reliance on social norms. Indeed, social norms can be effective in regulating intellectual property rights in a wide variety of creative

¹⁶⁰ Fair use protects otherwise infringing activities when undertaken "for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research." 17 U.S.C. § 107 (2012). Fair use is one of the "traditional First Amendment safeguards" of copyright law that serves as a "built-in First Amendment accommodation[.]" *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003). The topic of fair use in relation to the DMCA has been debated extensively in the literature but is beyond the scope of this Note.

¹⁶¹ For an example of technology tightening the net to make it more difficult to circumvent a paywall, see *supra* note 42 and accompanying text.

¹⁶² See Lee Kovarsky, *A Technological Theory of the Arms Race*, 81 *IND. L.J.* 917, 918–19 (2006) (contextualizing the DMCA as one in a series of legislative enactments intended to curtail the wasteful "technological arms race[.]"); see also Dan L. Burk, *Muddy Rules for Cyberspace*, 21 *CARDOZO L. REV.* 121, 172 (1999) (describing the problems inherent in technological "range wars"); Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 *U. CHI. LEGAL F.* 217, 251 (describing mounting technological self-help strategies as "a kind of wasteful 'arms race'").

communities, including fashion,¹⁶³ stand-up comedy,¹⁶⁴ tattoos,¹⁶⁵ and haute cuisine.¹⁶⁶ Professor Mark Schultz characterizes social norms in copyright, or “copynorms,” as “greatly influenc[ing] how copyright is enforced and observed.”¹⁶⁷

Social norms influence behavior by serving both signaling and esteem functions.¹⁶⁸ Professor Eric Posner’s signaling theory argues that complying with social norms signals to one’s acquaintances that one is worthy of trust in future transactions.¹⁶⁹ Professor Richard McAdams’s esteem theory, by contrast, argues that individuals comply with social norms in order to win the esteem of their peers; essentially, people follow the rules to get others to like them.¹⁷⁰ However they work, social norms are key in promoting copyright compliance. As Professor Schultz writes, “If copyright law is to be rescued from non-compliance, it will be because most people choose to obey it voluntarily, like they do most other laws.”¹⁷¹

While social norms are generally understood as functioning most effectively in the context of small communities with strongly interconnected ties,¹⁷² recent scholarship on the social psychology of norms in larger, more loosely connected groups suggests that social norms may still play a role despite the anonymity of the Internet.¹⁷³ Pro-

¹⁶³ See generally KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* 50–52 (2012) (discussing the role of social norms against copying in the fashion industry).

¹⁶⁴ See generally Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008) (discussing the role of social norms among comedians against copying jokes and the sometimes violent self-help measures used to enforce those norms).

¹⁶⁵ See generally Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511 (2013) (discussing the use of social norms against copying among tattoo artists).

¹⁶⁶ See generally Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121, 1151–55 (2007) (discussing the role and function of social norms against copying in the culinary world).

¹⁶⁷ Mark F. Schultz, *Copynorms: Copyright Law and Social Norms*, in 1 *INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE* 201, 202 (Peter K. Yu ed., 2007).

¹⁶⁸ Schultz, *supra* note 45, at 695.

¹⁶⁹ *Id.* (citing ERIC A. POSNER, *LAW AND SOCIAL NORMS* 19–27 (2000)).

¹⁷⁰ *Id.* (citing Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997)).

¹⁷¹ *Id.* at 667.

¹⁷² For a discussion of social norms in the context of such a small community, see Buccafusco, *supra* note 166, at 1122. See also Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHI.-KENT L. REV. 1257, 1267 (1998) (exploring why “[n]orms develop most clearly and most easily in a static community”).

¹⁷³ See Schultz, *supra* note 45, at 697–98 (describing the social norms of the jam-band community, a group that, for the most part, interacts over the Internet via email lists and

fessor Schultz suggests that effective implementation of copynorms will require, *inter alia*, giving people a meaningful chance to comply with the law¹⁷⁴ and providing prominent examples of others' compliance.¹⁷⁵

The right paypal design and strategic efforts to develop social norms around paywalls would probably do as much to encourage compliance as the DMCA's anticircumvention provision, if not more.

3. *Limitations*

While market forces and social norms may provide alternative means of protecting the right of access, they are not without limitations.

For instance, market forces may provide a more efficient means of regulating access to copyrighted content on the Internet,¹⁷⁶ but they are not free of risk: Allowing powerful copyright holders to dictate the terms of engagement with online copyrighted content could result in a privatized copyright regime worse than the current statutory scheme, with no democratic avenues for change.¹⁷⁷ Additionally, because the Internet is still relatively new and rapidly evolving, copyright owners may not be able to afford to wait for a new pattern of respect for copyright to emerge.

Ultimately, the best fix will likely be amendment of the statute. However, Congress's efforts at creating technology law thus far leave much to be desired. To be sure, no statute is perfect; it is doubtful that the DMCA can ever be broad enough to capture all the relevant technology while managing to avoid sweeping up innocent behavior. But if copyright owners are to enjoy robust protections for the valuable right of access, Congress must find a way to revise the DMCA to grant access rights that keep pace with changing technology.

message boards). *But see* Lemley, *supra* note 172, at 1293 ("It is not at all clear that the exuberance shown by some scholars over the self-governance potential of the Net is warranted.").

¹⁷⁴ Schultz, *supra* note 45, at 725 ("To create the right conditions for cooperative behavior, people first need a chance to comply.").

¹⁷⁵ *Id.* at 725–26 ("People are pre-disposed to obey the law, but nobody wants to be the last sucker who is actually paying for music.").

¹⁷⁶ See Rick Prelinger, *Yes, Information Wants to Be Free, But How's That Going to Happen? Strategies for Freeing Intellectual Property*, in *THE ANTI-CAPITALISM READER: IMAGINING A GEOGRAPHY OF OPPOSITION* 263, 269 (Joel Schalit ed., 2002) ("As long as IP is bought and sold as a commodity, market rules will continue to apply.").

¹⁷⁷ See generally Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462, 465 (1998) (discussing the shortcomings of technological responses to market forces in creating and enforcing a copyright regime).

CONCLUSION

In *Chamberlain*, the Federal Circuit insisted that Congress could not possibly have intended to encourage copyright owners to provide appropriate public access to their works—the goal of the Copyright Clause—by granting them power to deny any and all access to their works, regardless of whether that access enabled infringement.¹⁷⁸ However, a hypothetical application of the DMCA’s anti-circumvention provision to online paywalls shows that users can and do seek to gain access to copyrighted material without seeking to infringe the underlying copyright. Copyright owners should, therefore, be able to control and capitalize on that valuable interest in access. In adopting the DMCA, Congress sought to provide copyright owners with a statutory tool to prevent unauthorized noninfringing access. Nevertheless, the DMCA is but a first, flawed attempt at achieving that goal. Creating a robust system of access protection will require a multifaceted approach to addressing the needs and behaviors of copyrighted digital works’ owners and users. This Note suggests an approach that entails refocusing the DMCA’s statutory provisions, coupled with an intentional reliance on market forces and social norms. Through this approach, copyright owners, especially those who have created digital media, will be able to protect the valuable right of access to their works.

¹⁷⁸ See *supra* Part II.A.2 (discussing the *Chamberlain* court’s incredulity).