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## Copyrights Without Limits—The Undefeatable Right of Access Control Under §1201(A) of the Digital Millennium Copyright Act

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COPYRIGHTS WITHOUT LIMITS

THE UNDEFEATABLE RIGHT OF ACCESS  
CONTROL UNDER §1201(A) OF THE DIGITAL  
MILLENNIUM COPYRIGHT ACT

KRISTIAN D. STOUT, ESQ.\*

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## INTRODUCTION

The law of unintended consequences is inescapable. Although the criticism of the Digital Millennium Copyright Act (“DMCA”) reached a height more than a decade ago, the damaging effects this law has on innovation continues to this day. Section 1201 of the DMCA contains prohibitions on the use of and trafficking in technologies that “effectively control[] access to work[s]” protected under the Copyright Act (the “anti-circumvention provisions”). In a commendable effort to hedge against their own inability to foresee changes in the landscape of technology, Congress created a power in the Librarian of Congress (“LOC”) to establish exemptions to the DMCA’s anti-circumvention provisions every three years.<sup>1</sup> However, such a grant of power only underscores how well Congress is aware that the DMCA could hinder innovation and consumer choice, and how that body is consequently forced to play defense against the negative effects of the law. Congress is forced to consider and ratify the selective exemptions that the LOC chooses to make regarding who should be exempted.

A recent controversy involving this section of the DMCA is responsible for the Unlocking Consumer Choice and Wireless Competition Act (“Consumer Choice Act”), signed into law by President Obama.<sup>2</sup> Starting in 2006, the Copyright Office recognized an exemption to §1201 that would allow for consumers to unlock their cellphones—a process by which an individual purchaser would be able to take a phone purchased, for instance, at an AT&T store and use it on Verizon’s network.<sup>3</sup> This exemption was renewed in 2010, but in 2013 the Copyright Office refused to renew it again.<sup>4</sup> When the exemption was lost, a petition was created on WhiteHouse.gov that fetched over 114,000 signatures in favor of allowing cell phone unlocking.<sup>5</sup>

The Consumer Choice Act was the result of coordination between the “FCC, industry, and Congress,” and allowed consumers “to use their phones or mobile devices on any network they choose.”<sup>6</sup> This law enshrines the

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1. Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 1201(a)(1)(C) (2014).

2. Press Release, President Barack Obama, Statement from the President on Unlocking Consumer Choice and Wireless Competition Act, (July 25, 2014), <http://www.whitehouse.gov/the-press-office/2014/07/25/statement-president-unlocking-consumer-choice-and-wireless-competition-a>.

3. Recommendation from Marybeth Peters, Register of Copyrights, to James Billington, Librarian of Cong. (Nov. 17, 2006) *available at* [http://www.copyright.gov/1201/docs/1201\\_recommendation.pdf](http://www.copyright.gov/1201/docs/1201_recommendation.pdf).

4. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65,260 (Oct. 26, 2012) (to be codified at 37 C.F.R. pt. 201).

5. Jeff Zients and Sen. Patrick Leahy, *Answering the Public’s Call*, THE WHITE HOUSE BLOG (Sept. 1, 2014), <http://www.whitehouse.gov/blog/2014/08/01/answering-publics-call>.

6. President Barack Obama, *supra* note 2.

previously retracted exemption that allows users of cell phones to unlock their devices without running afoul of §1201 of the DMCA.<sup>7</sup> Thus, the legislation officially recognizes a practice that should have arguably never been proscribed by copyright law.<sup>8</sup> No actual copyright infringement was at issue when users simply wanted to use their cellphones on different networks. The DMCA, in this case, was merely a set of handcuffs locking consumers into a particular consumption pattern preferred by device manufacturers and network carriers. Moreover, this one fairly narrow, mundane issue—consumer choice in the use of cellphones – hints at the untold existence of other possible alternate uses of devices and technologies that are kept from the market because of fears that they won’t pass muster under §1201.

For instance, it is easy to imagine that the recent anti-trust action against Keurig manufacturer Green Mountain Coffee could provide the groundwork for §1201 actions to enforce Green Mountain’s market dominance.<sup>9</sup> In the Keurig case, Treehouse Foods has sued Green Mountain for violating the Sherman Act on the grounds that Green Mountain will begin to issue new machines that are only capable of reading their own proprietary label format.<sup>10</sup> Assuming for the moment that Green Mountain prevails on this action and are able to manufacture these new software-protected machines, it is a short leap of legal reasoning away to connect the coffee makers to the DMCA. Green Mountain makes an effective technological protection measure pre-loaded on their coffee makers. A competitor who wants to sell coffee K-Cups to the very large Keurig market would need to create labels that are compatible with

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7. Sen. Patrick Leahy, *Unlocking Consumer Choice and Wireless Competition Act Managers’ Amendment to S.517*, [https://www.leahy.senate.gov/download/onepager\\_unlocking-consumer-choice-and-wireless-competition-act](https://www.leahy.senate.gov/download/onepager_unlocking-consumer-choice-and-wireless-competition-act) (last visited Feb. 17, 2015).

8. *Id.* Much of the criticism around § 1201 has involved the observation that it can be used to create business advantage, even without copyright infringement. In the hearings to the cellphone locking bill, Representative Zoe Lofgren notes that, “[i]t’s not Congress’ role to tell people the business model they should use[.]” Bryan Suchenski, *Does Congress Mean to Enforce Particular Business Models with Copyright Law?* PUBLIC KNOWLEDGE BLOG, ¶ 4, (Sept. 1, 2014), <https://www.publicknowledge.org/news-blog/blogs/does-congress-mean-to-enforce-particular-business-models-with-copyright-law>. Moreover, at the same hearing, Stephen Metalitz, an attorney for several large rights-holders, went so far as to observe that the specific intention of § 1201 was not just to protect copyright, but also to protect specific business models. *Id.* at ¶ 12.

9. *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, 2014 U.S. Dist. LEXIS 81170 (J.P.M.L. June 9, 2014). *See also* Karl Bode, *Keurig Will Use DRM In New Coffee Maker To Lock Out Refill Market*, TECHDIRT (Mar. 3, 2014, 5:32 AM), <https://www.techdirt.com/articles/20140704/07112927780/keurig-begins-demonstrating-its-coffee-drm-system-as-expected-it-has-nothing-to-do-with-safety.shtml>; Mike Masnick, *Keurig Begins Demonstrating Its Coffee DRM System; As Expected, It Has Nothing To Do With ‘Safety’*, TECHDIRT (JULY 9, 2014, 8:51 AM), <https://www.techdirt.com/articles/20140227/06521826371/keurig-will-use-drm-new-coffee-maker-to-lock-out-refill-market.shtml>.

10. *In re Keurig*, 2014 U.S. Dist. LEXIS 81170 at \*3.

the software in the machines, and to do so would be effectively bypassing a technological protection measure. Thus, an action to protect the market share of a coffee machine manufacturer would fall very plausibly within the ambit of the DMCA—a law ostensibly written to protect the copyright interests of rights holders.

However, the focus on what exemptions the LOC will recognize, and when Congress will fully authorize them by statute, is something of a sideshow—at least when judged against the entire framework of §1201 and certain defects therein. In the jurisprudence surrounding the DMCA, there yet remains a circuit split regarding important implications of new property rights arguably, and accidentally, created in the anti-circumvention provisions. Thus, the viability of this law as it is sometimes being applied is far from certain until it reaches the Supreme Court.

Section 1201(a) specifically forbids the circumvention of technological protection measures (“TPM”) that effectively control access to a work protected under the Copyright Act.<sup>11</sup> By contrast, §1201(b) prohibits trafficking in devices that enable third parties to circumvent TPMs that effectively protect a *right* of a copyright holder guaranteed under the Copyright Act.<sup>12</sup> Therefore, §1201(a) appears to provide a cause of action when someone merely circumvents a protection measure, regardless of whether a particular right of a copyright holder is violated, whereas §1201(b) requires that the measure in question actually be in service of protecting a right granted under the Copyright Act.

The Federal Circuit has held that §1201(a), despite its broad language, could not reasonably be read to mean that it was forbidden to circumvent a TPM, when that measure has no connection to an actual right guaranteed under the Copyright Act.<sup>13</sup> In the view of the Federal Circuit, without a nexus between circumvention and the infringement of a right, §1201(a) would create a nearly unbounded new property right that extends far beyond the scope of what one would consider a copyright.<sup>14</sup>

By contrast, the Ninth Circuit believes that the plain language of the text of §1201(a), coupled with certain readings of the legislative history, compel it to recognize a broad access control right.<sup>15</sup> In reaching its holding, the Ninth Circuit acknowledged the arguments underlying the Federal Circuit’s opinion,

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11. 17 U.S.C. § 1201(a).

12. *Id.* at § 1201(b).

13. *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1203 (Fed. Cir. 2004).

14. *Id.*

15. *MDY Indus., LLC v. Blizzard Entm’t Inc.*, 629 F.3d 928, 946 (9th Cir. 2010) *opinion amended and superseded on denial of reh’g*, No. 09-15932, 2011 WL 538748 (9th Cir. Feb. 17, 2011).



and dismissed them as mere policy considerations.<sup>16</sup>

This Paper examines the tensions between these two positions. Much of the reasoning in both opinions turned on statutory interpretation techniques, with each court relying on a different set of suppositions regarding how best to interpret §1201. Ultimately, this Paper will take the position that the Federal Circuit is on the better constitutional and statutory interpretation ground for various reasons, and that the Supreme Court should see §1201 as requiring an infringement nexus.

Part I of this Paper describes in more detail the tension between the Ninth Circuit and the Federal Circuit regarding the proper construction of §1201. Part II then examines the constitutional implications of the Ninth Circuit's "no nexus" position. Part III moves on to examine the various statutory interpretation techniques employed by both courts, and the strengths and weaknesses of each.

## I. CIRCUIT SPLIT: SKYLINK AND MDY

### A. *Skylink*

*Chamberlain v. Skylink* is a seminal case in the Federal Circuit dealing with §1201 anti-circumvention interpretation.<sup>17</sup> In *Chamberlain*, the Federal Circuit held that, in order to succeed under a §1201(a)(2) access violation claim, a plaintiff must show that the circumventing technology infringes or facilitates others in infringing some right guaranteed to the plaintiff under the Copyright Act.<sup>18</sup> This requirement has been called the "infringement nexus requirement."<sup>19</sup>

The plaintiff, Chamberlain, a seller of garage door systems, protected its garage doors with a security system based on a "rolling code."<sup>20</sup> This rolling code system continually rotated the transmitter frequency needed to open the door, thus allowing enhanced security against criminal entry.<sup>21</sup> The defendant, Skylink, manufactured a universal transmitter system that was designed to interoperate with a variety of garage door systems, including the plaintiff's.<sup>22</sup> Chamberlain sued Skylink under §1201(a)(2), alleging that Skylink's garage door opening system evaded a TPM embodied in the

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16. *Id.*

17. *Chamberlain*, 381 F.3d at 1203.

18. *Id.*

19. *MDY*, 629 F.3d at 948.

20. *Chamberlain*, 381 F.3d at 1203.

21. *Id.* at 1183.

22. *Id.* at 1185.

“rolling code” system.<sup>23</sup> Therefore, by selling such systems, Chamberlain alleged that Skylink had trafficked in devices designed to circumvent TPMs, and was in violation of §1201(a)(2).<sup>24</sup>

The district court found for Skylink, basing its holding on the idea that, because Chamberlain had never restricted its customers’ use of competing transmitters, the customers were implicitly authorized to use Skylink’s product.<sup>25</sup> Thus, with the implied authorization, there was no unauthorized access in violation of §1201.<sup>26</sup>

The Federal Circuit upheld the district court, but it did so on other grounds. The Federal Circuit held that without either a copyright infringement, or the facilitation of infringement, §1201(a)(2) could not be applied.<sup>27</sup> In so doing, the Federal Circuit opined that the access provision was necessarily tied to a copyright owner’s rights, and could not operate as a free-floating provision.<sup>28</sup> Under the Federal Circuit’s reading of §1201(a)(2), the DMCA did not create a brand new access right unmoored from the rights guaranteed under §106 of the Copyright Act.<sup>29</sup> The rights provided by §1201(a)(2) were to a new cause of action, and not to a new form of property right.<sup>30</sup> Therefore, the Federal Circuit held that, in order to prevail under §1201(a)(2), a plaintiff needed to demonstrate a reasonable relationship between the circumvention device and the potential for it to violate a §106 right.<sup>31</sup>

The Federal Circuit clarified how §1201(a)(2) functions by describing three possible situations: (1) parties that traffic in circumvention devices may be subject to liability whether they infringe or not, because their devices are capable of allowing others to infringe; (2) parties that use such devices could theoretically be liable for infringement *per se* under §106; and (3) parties who provide circumvention devices that do not facilitate infringement, but nonetheless enable the circumvention of an access control measure, will not be subject to §1201 liability.<sup>32</sup> The upshot of the Federal Circuit’s position is that §1201(a)(2) did not create a new right, but only a new cause of action linked to the rights already guaranteed under the Copyright Act.

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23. *Id.* at 1183.

24. *Id.*

25. *Id.* at 1187–88.

26. *Id.*

27. *Id.* at 1202–03.

28. *Id.*

29. *Id.* at 1192–93.

30. *Id.*

31. *Id.* at 1195.

32. *Id.*

*Chamberlain* based its holding on a number of factors, several of which are relevant for our purposes here. Citing legislative history, the court noted that the DMCA was enacted in order to create a workable balance between users and content providers in the new digital age.<sup>33</sup> Reasoning from this proposition, the Federal Circuit believed that a nexus requirement was necessary in order to properly strike that balance.<sup>34</sup> More importantly, the Federal Circuit recognized that an access control right unmoored from the §106 rights would allow copyright holders license to act in undesirable ways.<sup>35</sup> For instance, a copyright holder could defeat Fair Use defenses merely by wrapping content in an effective, if technologically trivial, protection measure.<sup>36</sup> *Chamberlain* also recognized the possibility of “absurd and disastrous results” that would follow from reading §1201(a)(2) literally.<sup>37</sup> Among these was, for instance, the possibility of treating a home burglar alarm as an effective access control measure on the copyrighted books within a residence, leading to liability under the DMCA for disabling the burglar alarm.<sup>38</sup> As the court observed:

[According to] *Chamberlain*’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 “circumvented a technological measure that effectively controls access to a work protected under [the Copyright Act].” . . . The appropriate deterrents to this type of behavior lie in tort law and criminal law, not in copyright law. Yet, were we to read the statute’s “plain language” as *Chamberlain* urges, disabling a burglar alarm would be a per se violation of the DMCA.<sup>39</sup>

Further, *Chamberlain* noted that Congress’s authority to enact the DMCA was questionable, and some constructions of the statute could run afoul of the Constitution.<sup>40</sup> The court noted that a nexus requirement must exist within the

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33. *Id.* at 1196 (citing H.R. REP. NO. 105-551, at 26 (1998)).

34. *Id.*

35. *Id.* at 1201.

36. *Id.* The Ninth Circuit is not alone in disagreeing with the Federal Circuit in this regard. In *Universal City Studios v. Corley*, 273 F.3d 429, 443-44 (2d Cir. 2001), the Second Circuit held that the DMCA’s anti-circumvention provisions were unconcerned with the use to which content was put once the TPMs were bypassed. This extended to even possible Fair Uses.

37. *Chamberlain*, 381 F.3d at 1201.

38. *Id.*

39. *Id.*

40. *Id.* at 1200.

law in order to make it a rational use of power because, otherwise, the bare language could lead to the creation of monopoly over public domain works.<sup>41</sup>

Without an infringement nexus, a party could add a trivial amount of copyrighted material together with expired or otherwise public domain content. If he then adds a simple protection scheme to the combined content, under the DMCA, he would obtain a right over the public domain content he could not otherwise have had.<sup>42</sup> For instance, imagine that a previously unknown Shakespeare manuscript is discovered, the authorship of which is proven beyond dispute. Technically, this work should exist in the public domain. However, imagine that the discoverer writes a forward for the piece, and packages it together in a paid digital download that is acquired only after acknowledging a restrictive licensing agreement. Reverse engineering the protection on said file in order to extract the purely public domain content would amount to a violation of §1201, even though the content being sought is strictly public domain material.

Similarly, the Federal Circuit observed that without an infringement nexus, the Copyright Act could become contradictory.<sup>43</sup> The court observed that §1201(c)(1) explicitly directs that “nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including Fair Use, under this title.”<sup>44</sup> Under the Federal Circuit’s view, if §1201(a)(2) truly were creating a new right unmoored from the §106 list of rights, it would be in effect altering rights, remedies and defenses under the Copyright Act.<sup>45</sup> According to the Federal Circuit, “[a] provision that prohibited access without regard to the rest of the Copyright Act would clearly affect rights and limitations, if not remedies and defenses” that would “flatly contradict §1201(c)(1).”<sup>46</sup>

Thus, the Federal Circuit held that Skylink, having neither infringed a right nor enabled infringement, was not liable under §1201(a)(2).<sup>47</sup>

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41. *Id.*

42. This particular example contemplates material that may be rare in some fashion, but otherwise considered public domain.

43. *Chamberlain*, 381 F.3d at 1200.

44. *Id.*

45. *Id.*

46. *Id.* Note again that this stands in contrast to the Second Circuit’s position regarding Fair Use and the DMCA. In considering whether § 1201(c)(1) does in fact prohibit expanding a broad access right, the Second Circuit held 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.” *Universal City Studios v. Corley*, 273 F.3d 429, 443–44 (2d Cir. 2001).

47. *Chamberlain*, 381 F.3d at 1200.

*B. MDY*

*MDY v. Blizzard* involved a dispute over the use of third party software to alter the game playing experience of the popular online role-playing game World of Warcraft (“WoW”).<sup>48</sup> WoW provides a real-time simulated fantasy world in which users create characters, such as elves and orcs, and amass experience, equipment, and virtual gold.<sup>49</sup> Within WoW there were various player-to-player and in-game facilities that enabled users to acquire virtual gold and in-game equipment.<sup>50</sup> Michael Donnelly (“MDY”) wrote a computer program, known as a “bot,” called “Glider” that would automatically play a person’s characters in WoW.<sup>51</sup> This allowed such users to more quickly advance through the game than users who did not employ the bot software.<sup>52</sup>

Before a user can access the WoW virtual world they must agree to an End User License Agreement (“EULA”) as well as a Terms of Use (“TOU”) policy.<sup>53</sup> Although initially Blizzard may not have explicitly disallowed the use of bots in their EULA or TOU, by late 2005 MDY was admittedly aware that bot use was considered a violation of Blizzard’s TOU.<sup>54</sup> To combat the use of bots, Blizzard created a program named “Warden” that scanned the user’s computer to detect bot usage.<sup>55</sup> When such a user was found, that user was banned from WoW.<sup>56</sup> In response, MDY continuously modified Glider to evade detection and enable users to continue violating Blizzard’s TOU, even after the period in which it was clear that bots were disallowed in WoW.<sup>57</sup>

The exact extent of Glider’s impact on the WoW experience for non-Glider users, as well as on Blizzard was disputed.<sup>58</sup> Blizzard claimed that thousands of users reported complaints about others using Glider.<sup>59</sup> Blizzard also claimed that it spent nearly \$1M each year in order to respond to the complaints of unauthorized bots.<sup>60</sup> Further, MDY explicitly made its anti-

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48. *MDY Indus., LLC v. Blizzard Entm’t Inc.*, 629 F.3d 928, 935 (9th Cir. 2010).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 936.

55. *Id.* at 935–36.

56. *Id.*

57. *Id.* at 936.

58. *Id.* at 935–36.

59. *Id.* at 936.

60. *Id.* Blizzard claimed it received 465,000 complaints, of which “several thousand” named Glider. Thus, the full cost of \$1,000,000 would not be directly attributable to Glider, although, some significant percentage would be so attributable.

detection software in such a way as to waste Blizzard's resources when it tried to root out the bot usage.<sup>61</sup> The goal for MDY was "to make it bad business to spend that much time altering their detection code to find Glider[.]"<sup>62</sup>

There were two primary causes of action in *MDY*. First, Blizzard asserted a claim of contributory or vicarious copyright infringement that focused on an aspect of the case not relevant to the subject of this Paper.<sup>63</sup> In the second issue, however, Blizzard alleged that MDY was liable under §1201 of the DMCA for creating and distributing the technological means of defeating Warden, Blizzard's access protection measure for WoW.<sup>64</sup>

The district court held that MDY's program violated both §1201(a) (the access provision) as well as §1201(b) (the "rights" provision) by allowing users of WoW to bypass the Warden program when playing the game online. As will be discussed in depth, *infra*, the Ninth Circuit agreed, ultimately holding that §1201(a) creates, in essence, a right of action for copyright holders that does not depend on an actual violation of their statutorily granted rights in 17 U.S.C. §106.<sup>65</sup>

Primarily, the Ninth Circuit reached this result by parsing the plain text of §1201.<sup>66</sup> First, the court noted that §1201(a) and §1201(b) explicitly point out the basis upon which protection is afforded.<sup>67</sup> On the one hand, §1201(a)(2) is directed only to "works protected under [the Copyright Act,]" while §1201(b)(1) is concerned with the "right of a copyright owner under [the Copyright Act.]" The court treated this textual difference as indicating that §1201(b)(1) required a violation of the rights guaranteed under §106 of the Copyright Act, while §1201(a)(2) intended to create a new right for copyright holders to "prevent circumvention of access controls . . . [on] copyrighted works."<sup>68</sup>

Second, the court observed that the examples given in the DMCA to illustrate what it means to "circumvent a technological measure" were things such as "descrambling a scrambled work" or "decrypting an encrypted work."<sup>69</sup> Neither of these activities is *per se* an activity that infringes upon a right guaranteed in §106.<sup>70</sup> The Ninth Circuit also noted that §1201(a)(1)(B)-

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61. *Id.*

62. *Id.*

63. *Id.* at 938–42.

64. *Id.* at 942.

65. *Id.* at 944.

66. *Id.* at 944–46.

67. *Id.* at 944.

68. *Id.* at 945.

69. *Id.*

70. *Id.*

(D) directed the Library of Congress to determine uses of copyrighted works that were non-infringing, but would otherwise run afoul of the Access provision.<sup>71</sup>

The Ninth Circuit rested the balance of its opinion upon legislative history, observing that the Senate Judiciary Committee felt that §1201(a) did not require an anti-circumvention clause, but only an anti-trafficking clause, because the current copyright law as of the enactment of the DMCA already prohibited infringement.<sup>72</sup> Therefore, the law needed only create a ban on trafficking in the tools that enabled infringement.<sup>73</sup> By contrast, there had been no right available generally providing for copyright holders that allowed them to prevent others from circumventing access control measures.<sup>74</sup>

Finally, the Ninth Circuit then characterized the Federal Circuit's nexus requirement as being born out of policy considerations.<sup>75</sup> Once so characterized, the Ninth Circuit believed such considerations were only for Congress to consider, and that the Federal Circuit had failed to recognize the proper statutory construction that supported its decision in *MDY*.<sup>76</sup>

## II. CONSTITUTIONAL IMPLICATIONS OF THE NO-NEXUS APPROACH

The Ninth Circuit felt that the text of §1201 totally controlled its decision<sup>77</sup>—an assertion that will be examined in detail in Part III, *infra*. However, even assuming that courts are bound to strictly interpret only the bare words contained in a statute, there are problematic constitutional implications with the manner in which the Ninth Circuit has read the scope of §1201 in *MDY*.

To understand the nature of this dilemma, we must first examine the source of Congress's power to enact the DMCA. At least two possible constitutional justifications exist for Congress's promulgation of the DMCA: the Copyright Clause and the Commerce Clause. Each will be examined in turn.

### A. The Copyright Clause

Section 1201 of the Copyright Act, the DMCA's provisions relating to the

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71. *Id.* at 945–56.

72. *Id.* at 945.

73. *Id.*

74. *Id.*

75. *Id.* at 950.

76. *Id.*

77. The court felt further analysis beyond the text was unnecessary “because of the clarity of the statute’s text.” *Id.*

circumvention of TPMs, is authorized pursuant to some particular grant of Constitutional power to Congress. The power to create laws governing copyrights, and thus the power to create the Copyright Act, flows from Article I, §8, Clause 8 (“Copyright Clause”) of the United States Constitution. This clause provides that Congress “shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]”

Indeed, in a seminal case recognizing the requirement that a work must be sufficiently creative in order to advance the progress of the useful arts, the Second Circuit observed that the Copyright Act would be void were it not to serve the ends strictly provided for in the Copyright Clause.<sup>78</sup> Moreover, the courts are obliged to construe the provisions of the Copyright Act, if possible, in such a way that their operation falls within the ambit of the Copyright Clause.<sup>79</sup> Although earlier courts had speculated that Congress might have the ability to regulate copyrights under its Commerce Clause power,<sup>80</sup> Congress itself has foreclosed that possibility as of the 1976 act.<sup>81</sup> Therefore, in order to be a valid exercise of power, any provision within the Copyright Act must be directed toward the securing of some exclusive right to a protected work.

It should also be noted that the protection of copyrights within the United States is wholly statutory.<sup>82</sup> The earlier distinction between federal and common law copyrights has largely diminished.<sup>83</sup> Before 1978, there had been some room for common law to operate in the area of unpublished

78. “The first question with which we must deal is that of the validity of the copyright. Our starting point must be the Constitution. For, as the [C]onstitutional power to enact the Copyright Act, 17 U.S.C.A. § 1 [(1976)] et seq., derives from Article 1, Sec. 8, that Act would be void if it went beyond granting monopolies (or exclusive franchises) to authorize whose works ‘promote the progress of science and the useful arts.’ . . . [W]e must, if possible, so construe the statute as to avoid holding it unconstitutional.” *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 512–13 (2d Cir. 1945).

79. *Id.*

80. *Chamberlin*, 150 F.2d at 512; *Picard v. United Aircraft Corp.*, 128 F.2d 632 (2d Cir.) (patent case), *cert. denied*, 317 U.S. 651 (1942).

81. “[T]here is no intention to deal with the question of whether Congress can or should offer the equivalent of copyright protection under some constitutional provision other than the patent-copyright clause of article 1, section 8.” H.R. REP. NO. 94-1476, at 131 (1976). *See Dowling v. United States*, 473 U.S. 207 (1985).

82. *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1, 15 (1908) *superseded by statute on other grounds*, *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 182 (D. Mass. 2008) and *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 433 (4th Cir. 1986); *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 346 (1908) (“copyright property under the Federal is wholly statutory, and depends upon the right created under the acts of Congress passed in pursuance of the authority conferred under (the Copyright Clause)”).

83. 1-2 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHTS* § 2.02 (2014).



works.<sup>84</sup> However, since 1978, §301(a) of the Copyright Act has fully preempted common law for all works that fall under the ambit of federal copyright law statutes.<sup>85</sup> Therefore, the rights that the Copyright Act protects must be enumerated somewhere within the Copyright Act itself, and cannot be implied from a background common law.

The question asked herein is whether the access right provided for in §1201 satisfies the foregoing Constitutional sketch by providing rights holders with a cause of action to vindicate an enumerated right guaranteed under the Copyright Act? The Copyright Clause is admittedly somewhat under-theorized in both the case law and the legislative history of the clause.<sup>86</sup> However, from a textual perspective, the Copyright Clause directs that Congress protect “the exclusive Right” to works of content creators for limited times.

As described above, without the benefit of a common law property right operating in the background of the federal law, the nature of a right must be explicitly defined. Section 106 of the Copyright Act, for instance, enumerates a specific set of well-defined rights that the federal law protects. By contrast, §1201(a)(2) prohibits the violation of a nebulous access right nowhere else defined within the Copyright Act. Section 1201 expands by implication the set of rights guaranteed by §106 to essentially include the right of controlling the *mode* of accessing a work, even when the access itself would not violate the terms of §106.

Under a literal reading of §1201(a), “owners of a work protected by both copyright and a technological measure that effectively controls access to that work . . . would possess unlimited rights to hold circumventors liable . . . merely for accessing that work, even if that access enabled only rights that the Copyright Act grants to the public.”<sup>87</sup> This is, of course, contrasted by the Ninth Circuit’s position in *MDY*, as well as by the Second Circuit’s position in *Corley* that the DMCA’s anti-circumvention provisions were unconcerned with the use to which content was put once the TPMs were bypassed<sup>88</sup>—

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84. *Id.*

85. 17 U.S.C. § 301 (2014).

86. 1-1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHTS § 1.02 (2014); “There was very little discussion of the Intellectual Property Clause among the Framers; there is no record of any debate over it at the Federal Convention.” Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 338 (2004) (emphasis original). See Thomas B. Nachbar, *Judicial Review and the Quest to Keep Copyright Pure*, 2 J. TELECOMM. & HIGH TECH. L. 33, 65 (2003) (“We know almost nothing about the process of authorship or of authors’ responsiveness to the incentives offered them by the copyright system; it is virtually certain that the Framers knew even less.”).

87. *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1200–02 (Fed. Cir. 2004).

88. *Universal City Studios v. Corley*, 273 F.3d 429, 443–44 (2d Cir. 2001).

possible Fair Uses of such content notwithstanding.<sup>89</sup> Nonetheless, the Federal Circuit's position represents at least another tension within the current jurisprudence surrounding the interpretation of §1201 that can only to be resolved by the Supreme Court. A further problem, as the court in *Chamberlain* observed, is that an unbounded access right potentially expands a party's entitlements to include capturing public domain works.<sup>90</sup>

Thus, if the Ninth Circuit is correct that Congress intended to allow §1201(a)(2) to operate without a nexus between circumvention and the violation of a protected right, 1201(a)(2) may violate the scope of Congressional power outlined in the Copyright Clause.

### 1. Paracopyright and the Commerce Clause

It is also possible to conceptualize the DMCA as an exercise of the Commerce Clause power. In *United States v. Elcom*,<sup>91</sup> the District Court for the Northern District of California was faced with a constitutional challenge to the DMCA on the grounds that it exceeded the constitutional limitations of the Copyright Clause.<sup>92</sup> The *Elcom* court recognized that the DMCA was not in fact a true enactment under the Copyright Clause, but was instead a sort of "paracopyright" statute that was validly enacted under the Commerce Clause.<sup>93</sup>

However, as the *Elcom* court recognized, Congress cannot use the Commerce Clause to eradicate a limitation on its power granted under another clause.<sup>94</sup> To resolve this issue, the *Elcom* court held that:

If the statute passed by Congress "is not fundamentally inconsistent with" the Intellectual Property clause and is otherwise within Congress' Commerce Power to enact, then the statute is not an unconstitutional exercise of congressional power.<sup>95</sup>

The *Elcom* court then recognized that the DMCA, even if merely paracopyright, was consistent with the Copyright Clause because it provided the economic incentives that promote the progress of the arts.<sup>96</sup>

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89. *Id.*

90. *Chamberlain*, 381 F.3d at 1200. See discussion *supra* Part II(a).

91. *United States v. Elcom, Ltd.*, 203 F. Supp. 2d 1111, 1137 (N.D. Cal. 2002).

92. *Id.*

93. *Id.* at 1140.

94. *Id.* at 1139 (citing *United States v. Moghadam*, 175 F.3d 1269, 1279-80 (11th Cir. 1999)); see also *Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 468-69 (1982).

95. *Id.* at 1139-40.

96. *Id.* at 1140.

However, it is important to note, that under *Elcom*'s reasoning if there was in fact a "fundamental inconsistency" with the Copyright Clause in the interpretation of a statute, such interpretation would be improper, constitutionally speaking.<sup>97</sup> Thus, Congress is not entitled to use its very broad Commerce Power to make an end-run around a limitation imposed upon it by the Copyrights Clause.

Other courts and commentators have likewise recognized that Congress cannot evade the limits of one clause of the Constitution by resort to another. Professor Perzanowski has observed that "[u]nless the limits of Clause 8 cabin the commerce power, those limits are effectively stricken from the Constitution, despite the Framers' best efforts to ensure that they could not be ignored."<sup>98</sup> Further, in *Moghadam*, the 11th Circuit held that an exercise of Commerce power is bound by the Copyright clause to the extent that the regulation in question is fundamentally inconsistent with Congress's Copyright power.<sup>99</sup>

Other courts have proposed a different test for determining when Congress exceeds its Copyright power. In *United States v. Martignon*, for instance, the District Court for the Southern District of New York held that statutes enacted under the Commerce Power that provided "copyright-like" rights should be bound under the Copyright Clause limitations.<sup>100</sup> In determining whether a statute was "copyright-like," the court used the fact that the statute it was examining was placed within Title 17 as persuasive evidence.<sup>101</sup>

What is suggested here is not that the entire DMCA is unconstitutional, as was argued in *Elcom*. Neither is it here the contention that §1201 is *per se* unconstitutional. Instead, the contention is that the manner in which the Ninth Circuit has read §1201 leads to a constitutional paradox that creates a fundamental inconsistency with the Copyright Clause.

As noted in *Elcom* and *Railway Labor Executives*, Congress cannot use

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97. *Id.*

98. Aaron K. Perzanowski, *The Penumbra Public Domain: Constitutional Limits on Quasi-Copyright Legislation*, 10 U. PA. J. CONST. L. 1081, 1082 (2008).

99. *Moghadam*, 175 F.3d at 1281.

100. *United States v. Martignon*, 346 F. Supp. 2d 413, 417 (S.D.N.Y. 2004), *vacated and remanded*, 492 F.3d 140 (2d Cir. 2007).

101. *Id.* On appeal, the District Court was overturned. The Court of Appeals for the Second Circuit did not directly rebuke the notion that Congress may be limited in its Commerce power but a limitation within the Copyright Act. *Martignon*, 492 F.3d at 152. The Second Circuit felt that the balance of how "copyright-like" the statute in question was did not balance in favor of finding it an exercise of Copyright power. *Id.* However, according to at least one commentator, the Second Circuit missed the entire point of the District Court's analysis. Perzanowski, *supra* note 98, at 1140.

the Commerce Clause to evade a limitation of the Copyright Clause.<sup>102</sup> Under the terms of the Copyright Clause, Congress must secure to authors a limited monopoly on their own works. Moreover, the purpose of the Copyright Clause is to give the public appropriate access to such works.<sup>103</sup>

However, as noted in Part II(a), *supra*, under the Ninth Circuit's reading of §1201, individuals could assert property right claims over both public domain works as well as the copyrighted works of others. The Ninth Circuit acknowledged and dismissed this position by characterizing the *Chamberlain* concerns as policy driven and consequently subordinate to a plain text reading of §1201(a)(2).<sup>104</sup> *Elcom* felt similarly about the potential use of the DMCA to monopolize public domain works when it said that "[n]othing within the DMCA grants any rights to anyone in any public domain work. A public domain work remains in the public domain and any person may make use of the public domain work for any purpose."<sup>105</sup>

However, merely because the Ninth Circuit or the court in *Elcom* may wish to dismiss this concern does not make it invalid. The situation remains that without a nexus requirement, the Ninth Circuit's reading of §1201 provides no principled basis for excluding the Federal Circuit's concerns. It is entirely possible that a person could obtain some public domain work that is in limited supply, reproduce it and protect it with a technological measure that grants to them an exclusive control over the public domain work that they would not have otherwise been able to obtain. When coupled with a licensing agreement, a party will be able to reap a monopolistic profit on a work that should otherwise be available in the public domain.

Section 1201 essentially converts copyright protection from a scheme intended to reward authors for original works of creativity into a way of rewarding companies that invest in developing technological barriers around content. While there is nothing wrong, *per se*, with rewarding the efforts of companies who are in the business of developing such protection measures, surely it is perverse to rely upon a copyright law in order to ensure their profits.

Therefore, under either the Copyright Clause or the Commerce clause, the

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102. "Railway Labor, Perry, and the Head Money Cases all embrace the notion that limits contained within one enumerated power can constrain legislation otherwise permissible under another grant of authority." *Id.* at 1094.

103. Under the Copyright Clause, Congress is directed to "the task of defin[e] the scope of the limited monopoly that should be granted to authors . . . in order to give the public appropriate access to their work product." *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1200 (Fed. Cir. 2004) (citing *Eldred v. Ashcroft*, 537 U.S. 186, 204–05 (2003)).

104. *MDY Indus., LLC v. Blizzard Entm't Inc.*, 629 F.3d 928, 950 (9th Cir. 2010).

105. *United States v. Elcom, Ltd.*, 203 F. Supp. 2d 1111, 1141 (N.D. Cal. 2002).

Ninth Circuit's application of §1201 may be constitutionally problematic. As noted above, the Ninth Circuit's reading of §1201 appears to be outside the scope of the Copyright Clause. Further, since the Commerce Clause cannot be used to end run around the limitations of the Copyright Clause, and the Ninth Circuit's interpretation leads to implications that are squarely at odds with the Copyright Clause, the Commerce Clause cannot justify the Ninth Circuit's reading.

### III. THE ACCESS RIGHT AND STATUTORY INTERPRETATION

The ideal court opinion marries fidelity to the statutory scheme with salutary incentives. Unfortunately, that amiable synthesis is unavailable, insofar as the anti-circumvention statute is concerned . . . the Digital Millennium Copyright Act in 1998 . . . has led to a situation in which no perfect judicial construction presents itself.<sup>106</sup>

The Ninth Circuit essentially dismissed the Federal Circuit's concerns over the alteration of the scope of rights and remedies related to copyright.<sup>107</sup> It opined that the creation of a new access right somehow evaded expanding or altering the "rights, remedies, limitations, or defenses to copyright infringement"<sup>108</sup> without explaining why.<sup>109</sup> It is here that the Ninth Circuit appears to be hanging its hat when it characterizes the Federal Circuit's concerns as mere policy considerations, and its own holding as firmly rooted in the text of §1201. However, the Federal Circuit's holding could be read a couple of different ways: either as a set of policy concerns, or as an expression of the ambiguity contained within the Access provision in the context of the Copyright Act and the DMCA. Although the Ninth Circuit preferred to view the issue as open and shut, citing the "clarity of the statute's text,"<sup>110</sup> the possibilities raised by the Federal Circuit highlight the Ninth Circuit's problematic construction of §1201.

Given this situation, the circuit split in question requires a careful statutory interpretation analysis.<sup>111</sup> Based on the concerns raised by the Ninth Circuit and the Federal Circuit, the relevant canons to consider are (1) textualism, (2) legislative history, (3) the rule against superfluities, and (4) the

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106. 3-12A MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHTS § 12A.06 (2014).

107. *MDY*, 629 F.3d at 950.

108. 17 U.S.C. § 1201(c)(1)(2014).

109. *Id.*

110. *Id.*

111. Before undertaking this endeavor, it is of course important to note that § 1201 is statutory law, and not constitutional law. Therefore, Congress is at liberty to redefine the law as it sees fit, even if this split reaches the Supreme Court.

golden rule, which guards against absurd results. Following a discussion of the canons and how they apply to the anti-circumvention provisions, I will examine some of the pragmatic concerns around statutory interpretation, including institutional concerns and recent empirical research that demonstrates how the aforementioned canons have been received by the Supreme Court.

### *A. Canons of Interpretation*

#### 1. Textualism

The first battleground over the proper interpretation of §1201 is on the textualist front. Indeed, the Ninth Circuit felt the issue was almost entirely disposed of by a recitation of the text of the statute.<sup>112</sup> Further, from the Ninth Circuit's perspective, to adapt a nexus requirement would "disregard the plain language of the statute[.]"<sup>113</sup> The Ninth Circuit's impulse is not unfounded. According to research performed by Professor Krishnakumar, textualism is cited most often as the preferred interpretive lens by Supreme Court justices.<sup>114</sup> Moreover, it is an oft-cited and reasonable evocation of courts that, when faced with a statute, interpretation must "begin, as always, with the text of the statute."<sup>115</sup>

However, notwithstanding the presentation of textualism as a sort of interpretive gatekeeper, textual interpretation is not an absolute method for resolving even apparently clear language in a statute.<sup>116</sup> In his *Chison v. Roemer* dissent, Justice Scalia laid out the textualist statutory interpretation strategy:

[F]irst, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good

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112. The court felt further analysis beyond the text was unnecessary "because of the clarity of the statute's text." *MDY*, 629 F.3d at 950.

113. *Id.*

114. This was an empirical study of the decisions from 2005 through 2008. I am relying upon these numbers as a general trend, but of course, as membership of the Court shifts, these approaches may shift as well. Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 *HASTINGS L.J.* 221, 279 (2010) (Table 3).

115. *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009) (quoting *Permanent Mission of India to United Nations v. City of New York*, 551 U.S. 193, 197 (2007)).

116. "It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928).

reason for the ordinary meaning appears plain—we apply that ordinary meaning.<sup>117</sup>

This view of textualism has long been a part of the Supreme Court's approach to statutory interpretation. For instance, in the seminal statutory interpretation case of *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), a Church contracted with a resident of England to come to the United States and work as a pastor and rector.<sup>118</sup> The United States prosecuted, claiming that the contract was forbidden by the act of February 26, 1885, 23 Stat. 332, c. 164.<sup>119</sup> The statute read in relevant part:

[I]t shall be unlawful for any . . . corporation . . . to prepay the transportation. . . of any alien . . . under contract . . . to perform labor or service of any kind in the United States[.]<sup>120</sup>

The Court acknowledged that the contract in question was certainly within the letter of the Act, but was nevertheless not a transaction that Congress intended to be punishable under the Act.<sup>121</sup> In support of its holding, the Court opined that “[i]t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”<sup>122</sup> Moreover, the Court did not believe that such an approach to legislative interpretation constituted a displacement of the legislators' will in favor of the judge's.<sup>123</sup> The Court based this position on the fact that:

[F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.<sup>124</sup>

Along these lines, the Court has held that a literal interpretation of Title

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117. *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

118. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 457–58 (1892).

119. *Id.* at 458.

120. *Id.* at 458.

121. *Id.* at 459.

122. *Id.*

123. *Id.*

124. *Id.*

VII of the Civil Rights Act of 1964 was inappropriate when considering affirmative action programs.<sup>125</sup> *United Steelworkers v. Weber* presented a dispute over whether Title VII prevented private employers from voluntarily implementing affirmative action plans.<sup>126</sup> The allegation was that such affirmative action programs constituted impermissible racial discrimination under Title VII, which made it unlawful to “discriminate . . . because of . . . race.”<sup>127</sup> The Court rejected this literal interpretation of Title VII on the grounds that it would effectively frustrate the intention of congress to ameliorate the adverse conditions that black workers faced in the economy.<sup>128</sup>

In other contexts, textualism likewise has not presented an absolute barrier to statutory interpretation. In *Rapanos v. United States*, for instance, Justice Scalia found that the interpretation of the phrase “in the waters of the United States” could not mean what it plainly said.<sup>129</sup> To interpret the phrase to literally mean every body of water in the United States would lead to the absurd consequence of allowing the Federal Government to step over its Constitutional limitations and regulate waterways that were purely within the purview of State governments.<sup>130</sup> Justice Scalia based this departure from the plain text on the basis that such an interpretation would exceed the bounds of the Commerce Clause.<sup>131</sup>

Thus, although textualism provides a strong anchor for most of the members of the Supreme Court in one fashion or another, when there is a statutory construction before it that may lead to absurd results or unconstitutional implications, the Court is unlikely to end with the text in the manner suggested by the Ninth Circuit in *MDY*.

In contrast to the Ninth Circuit, the Federal Circuit in *Chamberlain* recognized the nuance that attends to even avowedly plain text approaches to statutes. “Congress chose [the language of §1201] consistent with its stated intent to balance two sets of concerns pushing in opposite directions.”<sup>132</sup> This is to say, the words used in §1201 certainly are meant to provide a roadmap for judges in understanding how to apply the DMCA to cases. They can only be meaningfully understood by considering the whole context of §1201 within the DMCA, the Copyright Act, and the general federal law.

However, even assuming for the moment that the Ninth Circuit’s strict

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125. *United Steelworkers v. Weber*, 443 U.S. 193, 200 (1979).

126. *Id.*

127. *Id.*

128. *Id.* at 202.

129. *Rapanos v. United States*, 547 U.S. 715, 737–38 (2006).

130. *Id.*

131. *Id.*

132. *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1203 (Fed. Cir. 2004).



textualist preference is sound, and that we should only examine the printed words of the statute, the no-nexus approach still doesn't make obvious sense. Sections 1201(a) and 1201(b) explicitly limit the scope of the DMCA's anti-circumvention provisions to "a work protected under this title" – thus the work protected by the circumvention provisions must be one also protected by copyright law. Obviously, this would not apply to public domain works, or works owned by authors other than a plaintiff. Section 1201(c) goes on to state that "nothing in this section shall affect rights . . . under this title."

Further, the right that the Ninth Circuit believes is created by §1201(a) is not explicitly stated in the text—it is an inference of the section. The law does not say something such as "Copyright holders shall now have an additional right to control the use of their content." It simply prohibits the circumvention of TPMs. So, this begs the question: how can the law explicitly say it will not affect rights, make no mention of the creation of a new right, and yet be read with a strict textualist's eye to hold that there is a new property right created? Put simply, it cannot. In order to *protect*, a TPM must have some object of protection. Protecting a work "under this title" cannot be enough – it needs to protect a specific property right granted by the Copyright Act. Taken as a whole, the strict textualist approach will not do the work that the Ninth Circuit believes it can do.

## 2. Beyond Textualism

This Paper will not survey every canon of interpretation, merely the ones that featured in either the *MDY* or *Chamberlain* opinions, or which appear particularly relevant in light of the nature of the dispute. This section will look at the use of legislative history; the judicial practice of avoiding interpretations that render clauses superfluous; and the "golden rule"—the mandate to avoid interpretations that reach absurd conclusions. Given these interpretive lenses, this section will conclude with pragmatic considerations based on empirical studies of the trends in judicial opinions.

### *a. Legislative History*

Legislative History is one means of divining the legislative intent of the Congress that enacted a particular statute. As noted above, in *Church of the Holy Trinity*, the Court famously moved past the plain text of the statute to examine "the evil which [the statute] is designed to remedy."<sup>133</sup> Indeed, throughout much of the twentieth century, legislative history was relied upon in construing statutes before the Supreme Court.<sup>134</sup>

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133. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 457 (1892).

134. David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of*

The Ninth Circuit, believing that the textual structure of §1201 communicated a clear congressional intent to create an access right,<sup>135</sup> made much use of legislative history in reaching the *MDY* holding. Relying on the Senate Judiciary’s Report, the Ninth Circuit observed the committee’s opinion that “§§1201(a)(2) and (b)(1) are ‘not interchangeable,’” and that they were “designed to protect two distinct rights.”<sup>136</sup> Further, “§1201(a)(2) ‘is designed to protect access to a copyrighted work,’ while §1201(b)(1) ‘is designed to protect the traditional copyright rights of the copyright owner.’”<sup>137</sup> The Ninth Circuit went on:

The Senate Judiciary Committee proffered an example of §1201(a) liability with no nexus to infringement, stating that if an owner effectively protected access to a copyrighted work by use of a password, it would violate §1201(a)(2)(A). [T]o defeat or bypass the password and to make the means to do so, as long as the primary purpose of the means was to perform this kind of act. This is roughly analogous to making it illegal to break into a house using a tool, the primary purpose of which is to break into houses.<sup>138</sup>

It of course bears acknowledging that in the case of breaking into a house using thieves’ tools, the act of breaking into a house is always forbidden. In such a case, it of course makes sense that a legislature may contemplate banning those tools expressly designed for this purpose. Implied within the very hypothetical is the nexus between the *malum prohibitum* and the means of accomplishing it. However, in the case of §1201, you can be liable for a wrong without ever having acted in a way that would otherwise violate the law.

In contrast to the Ninth Circuit, the Federal Circuit took a different view of legislative intent. The Federal Circuit acknowledged that Congress intended to create new causes of action for circumvention and for trafficking in devices that enable circumvention.<sup>139</sup> However, “Congress did not choose to create new property rights.”<sup>140</sup> The Federal Circuit felt that to interpret Congress’s words otherwise, would be to upset the balance of rights and

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*Legislative History*, 51 WM. & MARY L. REV. 1653, 1715 (2010).

135. According to the Ninth Circuit, “there is significant textual evidence showing Congress’s intent to create a new anti-circumvention right in § 1201(a) distinct from infringement.” *MDY Indus., LLC v. Blizzard Entm’t Inc.*, 629 F.3d 928, 950 (9th Cir. 2010). *MDY*, 629 F.3d at 950.

136. *Id.* at 946–47.

137. *Id.*

138. *Id.* at 950 (citing S. REP. NO. 105–190, at 12).

139. *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1203 (Fed. Cir. 2004).

140. *Id.*

obligations in the Copyright Act, and to frustrate Congressional intent.<sup>141</sup>

Further, “Congress chose words consistent with its stated intent to balance two sets of concerns pushing in opposite directions.”<sup>142</sup> In the Federal Circuit’s view, the DMCA developed broad categories for both liability as well as exemption, and left the careful balancing of those interests up to the courts.<sup>143</sup>

However, the divergence between the Ninth Circuit and the Federal Circuit over the proper legislative history upon which to rely may be purely academic. Legislative history has been an interpretive rule on the decline over the last seventy years.<sup>144</sup> In part, some of this decline is attributable to the changing membership of the Court, but legislative history remains a controversial source for judicial interpretation.<sup>145</sup>

Various problems have been noted with relying upon legislative history. For instance, the Congressional Record, the official organ of Congress for reporting proceedings and debate, contains not merely the records of actual proceedings, but also “a large quantity of remarks and articles that were inserted without actually having been read.”<sup>146</sup> This leaves open the question of whether the Record is intended to be an accurate collection of Congress’ deliberations, or is instead a collection of views that disparate members of Congress had regarding a piece of legislation.<sup>147</sup>

Further, the contents of committee reports may even contain material that was not able to make it through the political process in order to survive a vote.<sup>148</sup> However, even if legislative intent is a valid way to view an ambiguous statute, it has been noted that legislative history provides, at best, a problematic documentary record.<sup>149</sup>

Justice Scalia, while a judge on the DC Circuit, expressed clearly his disdain for relying upon Committee Reports when interpreting statutes. He

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141. *Id.*

142. *Id.*

143. *Id.*

144. Law & Zaring, *supra* note 134, at 1715.

145. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside-an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 964 (2013).

146. OTTO J. HETZEL, MICHAEL E. LIBONATI & ROBERT F. WILLIAMS, LEGISLATIVE LAW AND STATUTORY INTERPRETATION: CASES AND MATERIALS 472 (4th ed. 2008).

147. *Id.*

148. Daniel A. Farber & Philip P. Frickey, *Legislative Intent And Public Choice*, 74 VA. L. REV. 423, 442. Farber and Frickey also outline generally how public choice theory and traditional political science suggest that Congress members are largely content to rely upon committee reports for explaining a law that comes before them.

149. *Id.* at 437.

wrote:

I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill. And I think it time for courts to become concerned about the fact that routine deference to the detail of committee reports, and the predictable expansion in that detail which routine deference has produced, are converting a system of judicial construction into a system of committee-staff prescription.<sup>150</sup>

In essence, the reliability of legislative history is undermined by judicial reliance upon it. Committee members write to the judges how they want cases to come out and thus find a way to possibly short circuit the intent of the broader legislature when it votes on the actual statutory language. There is also concern that the legislators themselves never draft or even read the committee reports that supposedly form the bedrock of legislative history.<sup>151</sup>

These critiques of legislative history are counterbalanced, however, by indications that the drafters of legislation are aware of reliance upon such history, and purposely write it as an explanatory rule.<sup>152</sup> Further, at times, when the House votes on a bill they have been known to defer to the relevant committee as a proxy for doing their own research, and such committees at times rely upon documents resembling legislative history in order to make their own vote.<sup>153</sup>

Professors Abbe R. Gluck and Lisa Schultz Bressman have written a recent article detailing their empirical research that highlights many heretofore-unknown contours of the legislative process.<sup>154</sup> Nearly 90% of the respondents to Professor Gluck's survey indicated that legislative history was written purposely to serve as an explanation of a statute.<sup>155</sup>

However, notwithstanding this fact, there does remain a strong kernel to the critique of legislative history. As unenacted text, it does represent a

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150. *Hirschey v. Fed. Energy Regulatory Comm'n*, 777 F.2d 1, 7–8 (D.C. Cir. 1985).

151. *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005). In reaching his conclusion in *Hirschey*, Justice Scalia cited an anecdote from the Senate involving Senator Dole. *Hirschey*, 777 F.2d at 1 n. 1. Under questioning from Senator Armstrong, Senator Dole admitted that he had not read nor contributed to the Committee Report prepared as part of a tax bill. *Id.* Ostensibly, much of the construction of the law was therefore built upon the authorship of staffers working for Senator Dole.

152. Gluck & Bressman, *supra* note 145, at 965–66.

153. *Id.* at 968–69.

154. *Id.*

155. *Id.* at 970.

counter-democratic impulse to rely upon it when it very possibly could contain language that is at odds with the language of the final enacted legislation.

Professor Gluck acknowledged that there was potential pro-legislative history bias among her respondents, as well. Professor Gluck's research shows that the people who write legislative history think legislative history is important. Notably, the staffers indicated that the most important legislative history was committee reports—the sorts of documents they themselves drafted.<sup>156</sup> They ranked floor speeches, and reports created outside the committee system as the least reliable—the sorts of reports that would be outside of the respondents' control.<sup>157</sup>

Ultimately, Professor Gluck notes that, despite staffers insistence that legislative history was intended as an interpretive tool, Congressional practice made it difficult for courts to determine when messages in legislative history were meant for them.<sup>158</sup> While such history may be useful at some point, likely it will not be so until Congress begins to indicate when it is speaking to future courts regarding intent in a specific piece of legislation.<sup>159</sup>

However, even assuming that legislative history and intent may be useful to the Court in examining §1201, the case still weighs against the Ninth Circuit's no-nexus approach. In light of the Copyright Act in general, and 1201(c) in particular, the Federal Circuit's view regarding legislative intent is far more plausible. Sections 1201(a) and 1201(b) explicitly limit the scope of the DMCA's anti-circumvention provisions to "a work protected under this title." Thus, for §1201 to apply, according to the clearly stated intent of the framers of that provision, the work must be protected by copyright law. This would not apply to public domain works, or works owned by other authors. Further, §1201(c) states that, "Nothing in this section shall affect rights . . . under this title." Therefore, the rather clear intent of §1201, when viewed in context of all of the anti-circumvention provisions taken together, cannot mean that there is a right created that is unmoored from copyright law.

Moreover, what does it actually mean for Congress to intend to have a clause that makes circumvention of TPMs protecting copyrighted works prohibited? Why would this copyright protection be totally unconnected from infringement? While the Ninth Circuit may try to shore up its position by claiming that 1201(c) in fact prevents claims by anyone not owning a copyright that is being protected by a TPM, this would not go far enough.

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156. *Id.* at 978.

157. *Id.*

158. *Id.* at 989–90.

159. *Id.*

The fact still remains that you can bundle small bits of copyrighted content together with non-copyrighted content, as discussed *supra*, and be able to claim a violation of §1201—even when the copyrighted material is not sought by the circumventer.

In order to shore up the Ninth Circuit's position, one would have to go too far in the direction of gutting §1201. In this reading, if the intention of the section was merely to protect works owned by the person asserting the violation, the clause could apply when the only material behind the TPM was copyright completely owned by the party bringing the claim, or when all material behind the TPM was copyrighted material, and every piece of it had been properly licensed to the party asserting the claim. This would certainly help the Ninth Circuit's position, but it would also prevent the protection of any content on, for instance, web sites that sometimes host content from other rights holders, or collections that bundle together the works of other authors. Any works that curate public domain materials and include original commentary could not work under this reading, since we would be trying to prevent the absurd result of using a TPM to prohibit access to public domain materials.

However, I do not think the Ninth Circuit's position can be rescued without an infringement nexus. I seriously doubt that the legislative intent can be plausibly read in this case to suggest that Congress wanted to create a loophole by which third parties can assert property rights in others' copyrights or in public domain works. Courts could certainly create schemes to try and manage the wide variety of content arrangements and parse out how to ascertain when a TPM circumvention was acceptable and when it wasn't. However, this is by far not the simplest mechanism available. The Federal Circuit's infringement nexus creates a very elegant solution. So what exactly was the intent of creating §1201(a), particularly in light of the fact that by requiring an infringement nexus, we essentially merge the actual circumvention with the infringement?

I believe that §1201(a) plausibly makes an *intent* to infringe a new way of enforcing existing rights. If a plaintiff can demonstrate circumstantial evidence that a circumventer was trying to infringe upon a protected work, even if they were not ultimately successful, or later had a change of heart after acquiring the content, §1201 provides a cause of action. The important point remains that the circumventer was attempting to use the content in a way forbidden by the existing scheme of rights guaranteed by the Copyright Act, and the anti-circumvention provision simply provides a new avenue for enforcing those rights. In this reading, we avoid creating new property rights, and we also give life to the intention of the framers that the existing rights to works protected under the Copyright Act remain unaffected.

*b. Superfluities*

The rule of superfluities directs judges and justices to interpret a statute in such a way as to give effect to all the parts of a statute.<sup>160</sup> However, this canon is rather complicated within the context of §1201. On the one hand, according to Gluck and Bressman, it may be entirely reasonable to expect superfluous clauses to make their way into legislation.<sup>161</sup>

Gluck and Bressman have characterized the situation of statutory drafters as being presented with “institutional barriers” that prevented them from being able to avoid redundancy in statutes.<sup>162</sup> According to Gluck and Bressman, although 62% of the drafters in their study were aware that courts assiduously attempted to interpret statutes in order to avoid superfluous clauses, only 18% of respondents said such a consideration mattered rarely, and 45% said it mattered sometimes.<sup>163</sup>

Two reasons were given to account for the rare consideration that the rule of superfluities garnered from statutory drafters. First, drafters were foremost concerned with covering all of the desired terrain, and erred “on the side of redundancy to ‘capture the universe’ or ‘because you just want to be sure you hit it.’”<sup>164</sup> Second, drafters frequently face political and lobbying pressure to include words and phrases, and they comply in order to make sure the bill proceeds, even when there may be a redundancy.<sup>165</sup>

Moreover, this sort of political compromise doesn’t occur only in large statutes where redundant language can be easily overlooked, but “even in short statutes—indeed, even within single sections of statutes . . . terms are often purposefully redundant to satisfy audiences other than courts.”<sup>166</sup>

On the other hand, the DMCA exists within the context of the Copyright Act, and operates along side statutes such as the Computer Fraud and Abuse Act (“CFAA”). The CFAA has long maintained a ban on unauthorized access to computer systems in a manner similar to the Ninth Circuit’s view of §1201.<sup>167</sup> The crucial distinction is that the CFAA requires a showing of damages in order to recover in a civil case.<sup>168</sup> Thus, under the Ninth Circuit’s approach, the DMCA actually provides an end-run around the regime created by the CFAA by allowing TPM’s to provide for damages.

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160. Krishnakumar, *supra* note 114, at 243.

161. Gluck & Bressman, *supra* note 145, at 934.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 935.

167. 18 U.S.C. § 1030 (2014).

168. *Id.* at § 1030(g).

For instance, in 2003, a company sued a software contractor for accessing its computer systems using a password protected VPN.<sup>169</sup> The company was unable to prevail under the CFAA and electronic trespass claims because they could not prove any actual damages.<sup>170</sup> However, it did prevail on a motion to dismiss because a VPN constituted a TPM within the meaning of §1201.<sup>171</sup> The plaintiff was able to succeed in using a copyright statute to make a “hacking” claim, where it could not succeed under the actual hacking law—the CFAA.<sup>172</sup>

Similarly, Ticketmaster was able to obtain a preliminary injunction against a company that had written software that evaded Ticketmaster’s CAPTCHA system.<sup>173</sup> While the CFAA was unavailable as a basis, owing to a lack of demonstrable damages,<sup>174</sup> the DMCA was available since the CAPTCHA codes effectively prevented access to Ticketmaster’s copyrighted webpages.<sup>175</sup> Even though the activity in question was one that had no aim at copyright infringement, indeed was a sort of harm wholly different from those affecting copyright entitlements, Ticketmaster was able to prevail.

Thus, it appears that §1201 swallows up the carefully delineated prohibitions of the CFAA. Congress considered what should be actionable in the context of hacking and wrote that into law as the CFAA. However, when drafting the DMCA, they (it would appear) inadvertently opened up a whole new cause of action that effectively makes the CFAA superfluous.

There is another superfluity issue that works against the Ninth Circuit’s holding. As discussed in Part III, *supra*, relying upon the Commerce Clause to enact a paracopyright statute may have the effect of rendering the Copyright Clause superfluous. Not only does the rule against superfluities work to retain provisions of statutes, but the Court also relies upon it to ensure that clauses of the Constitution are not nullified by particular constructions of a law.<sup>176</sup> The Court is reluctant to disturb the “Framers’ conception of the respective roles of the Commerce Clause and Clause 8.”<sup>177</sup>

Relying upon the Commerce clause to enact a provision of the Copyright

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169. Pearl Investments v. Standard I/O, Inc., 257 F. Supp. 2d 326 (D. Me., 2003).

170. *Id.* at 349.

171. *Id.* at 350.

172. *Id.*

173. Ticketmaster v. RMG Techs., Inc., 507 F. Supp. 2d 1096, 1116 (C.D. Cal. 2007).

174. *Id.* at 1113.

175. *Id.* at 1112.

176. Perzanowski, *supra* note 98, at 1101.

177. *Id.* Professor Perzanowski has observed that “[r]egardless of the precise scope of the commerce power, intellectual property regimes of the sort found in the Patent and Copyright Acts were thought to require a separate and additional source of authority.” *Id.* at 1102.



Act that provides to copyright holders a new form of property right may be just the sort of legislation that violates this principle. If Congress has easy resort to the Commerce Clause to violate the Copyright Clause, the Copyright Clause could become a nullity.

*c. The Golden Rule*

The mother of all consequentialist canons is undoubtedly the rule that statutes should not be construed to produce absurd results. By definition, the absurdity doctrine is oriented precisely to avoiding bad policy consequences[.]<sup>178</sup>

The Federal Circuit recognized at least one glaring contradiction with a no-nexus approach to §1201. That is, without an infringement nexus, the Copyright Act could become contradictory.<sup>179</sup> The court noted that § 1201(c)(1) explicitly directs that “nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including Fair Use, under this title.”<sup>180</sup> Thus, if § 1201(a)(2) truly were creating a new right unmoored from the §106 list of rights, it would be in effect altering rights, remedies and defenses under the Copyright Act.<sup>181</sup>

Moreover, not only does §1201(a)(2) potentially threaten Fair Use and public domain material, but, read literally, it has the absurd effect of creating a sort of property right in other holder’s copyrights. Were a person to include a copyrighted fragment that they owned in a collection that also contained the copyrighted works of a third party, theoretically they would have a cause of action against a person who evades the technological protection in order to access the work owned by another creator. Of course the wielder of §1201(a) here would also be liable for copyright infringement for copying the work of someone else, which only underscores the absurdity that such a literal “right” would entail.

How does it makes sense that within the Copyright Act there is a provision that would seemingly allow causes of action wholly unrelated to actual copyright infringement? Particularly in light of the fact that Congress had seen fit to establish a well known, and well prosecuted computer access regime in the CFAA. Can it really be reasonable to presume that Congress intended to short-circuit the balance of interests established in CFAA—essentially contradicting itself with the DMCA?

The real world outcomes of a no-nexus §1201 have already developed in

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178. Jane S. Schacter, *Text or Consequences?*, 76 BROOK. L. REV. 1007, 1011 (2011).

179. *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1200 (Fed. Cir. 2004).

180. *Id.*

181. *Id.*

ways that are arguably absurd. For example, following the enactment of the DMCA, the White House noticed a decline in security research related to fears over anti-circumvention, ostensibly related to fears of violating the pure access rights granted by §1201.<sup>182</sup> In another case, a foreign programmer was jailed when visiting the United States for having worked on a software program that allowed users to convert a protected Adobe format into an ordinary PDF, even without any alleged copyright infringement.<sup>183</sup>

Section 1201 has also supplied new tools for companies to use when vying for market share. For instance, by relying upon §1201, Craigslist was effectively able to prevent third-party services from providing automated tools to allow users an easier means of posting Craigslist ads.<sup>184</sup> In another case, Nikon was able to use §1201 to obtain market leverage over Adobe and other digital photo software companies by encrypting portions of the RAW format their digital cameras use for storage – even without Nikon having any claim to a copyright, and in a manner that aggressively undermines software and hardware interoperability.<sup>185</sup>

There are more examples of legal action that severely stretches the applicability of this provision within the Copyright Act to provide a catchall computer access law. The salient point here, is that it is absurd to hold that a provision of a *copyright* law could provide a powerful general legal tool against computer use generally, particularly when existing laws already do the work that §1201 is purported to perform.

However, the Ninth Circuit appears oblivious to the contradictions embedded in the language of the access provision. The court claimed that the access provision creates a right that is outside of traditional copyright infringement, and yet is directed against copyright infringement.<sup>186</sup> Without realizing it, the Ninth Circuit there acknowledges that the very purpose of the provision must require some connection to a protected right.

As discussed, *supra*, the Ninth Circuit's broad reading of §1201 could give a person the ability to apply a TPM to a public domain work, or even the copyrighted work of another, and yet have recourse over third parties that access that content by circumventing his TPM. The Ninth Circuit's approach

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182. Jonathan Band, *Congress Unknowingly Undermines Cyber-Security*, SAN JOSE MERCURY NEWS (2002) available at <http://www.policybandwidth.com/publications/JBand-IPCyberSecurity.pdf>.

183. Lawrence Lessig, *Jail Time in the Digital Age*, N.Y. TIMES A7 (2001), available at <http://www.nytimes.com/2001/07/30/opinion/30LESS.html>.

184. Craigslist, Inc. v. Naturemarket, Inc., 694 F. Supp. 2d 1039, 1050 (N.D. Cal. 2010).

185. Michael R. Tompkins, *Nikon Encrypts RAW File Data*, IMAGING RESOURCE (2005), available at <http://www.imaging-resource.com/NEWS/1113977781.html>.

186. MDY Indus., LLC v. Blizzard Entm't Inc., 629 F.3d 928, 946 (9th Cir. 2010).

provides no principled basis for marking this sort of instance out from the cases it envisions would properly operate within the provision.<sup>187</sup> Thus, without an infringement nexus, a broad reading of §1201 risks running the statute into absurdity.

*d. Pragmatic Considerations*

There are two ideas that need to be considered in order to round out an analysis of the interpretive landscape that a Supreme Court review of §1201 is likely to meet. First, scholars have noted that, textualism and canons notwithstanding, at times the Court comes down to a bare consequentialist justification for its holdings.<sup>188</sup>

Professor Shachter noted, for instance, that Justice Scalia, the great defender of textualism, would eschew a preferred reading of a statute if “it would undermine settlement incentives, lead to expensive factual inquiries, generate boondoggles, create a zany system, or produce perverse policy results of various stripes.”<sup>189</sup> She characterized Justice Scalia in these cases as “straightforwardly consequentialist.”<sup>190</sup>

Consequentialism extends beyond Justice Scalia. In one term, Professor Schachter recorded that consequentialism appeared prominently in 73% of the Court’s decisions.<sup>191</sup> Further, in another study of Supreme Court decisions between 1890 and 1990, it was found that Consequentialist considerations were featured in 28.8% of decisions.<sup>192</sup>

Given this propensity of the Court to look to the real consequences of a law when choosing when and how to follow the text or the legislative intent, it is reasonable to presume that the track record of §1201 will come under scrutiny. The unexpected results offered, *supra*, when discussing the avoidance of absurdities are far from isolated. *MDY* presented the case of a person trying to make a profit by breaking Blizzard’s rules. Perhaps this was a

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187. The Ninth Circuit opined that a valid extra-copyright entitlement provided by § 1201 includes something like a contractual enforcement mechanism. “[W]e would deprive copyright owners of the important enforcement tool that Congress granted them to make sure that they are compensated 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. The oddity in this position, however, is that accessing a copyrighted work with a computer and without the authorization of the creator is already an infringement insofar as § 106 defines the rights of the copyright holder as ones of use and authorization.

188. Schachter, *supra* note 178, at 1013–14.

189. *Id.*

190. *Id.*

191. *Id.* at 1014.

192. Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1097 (1992).

factor in the Ninth Circuit's strict view of §1201. However, depending on the case that reaches the Supreme Court, the facts may not be so easily construed in favor of finding the access right without an infringement nexus.

Second, the Ninth Circuit pegged much of its holding to legislative history.<sup>193</sup> Immediately upon becoming a Supreme Court Justice, Justice Scalia enjoyed a certain influence, even if unspoken, that has over time tended to reduce reliance of the Court upon legislative history.<sup>194</sup> Further, the Court tends not to rely particularly upon pure textualism, legislative history, or the Golden Rule, but instead uses a variety of interpretive tools in order to ensure coherence in the law.<sup>195</sup> Practically, this reinforces the sense that textualism will not be the decisive mode of interpretation when construing §1201. However, among the possible alternatives, how would the Court likely choose its tools?

Anita S. Krishnakumar's empirical study of the Roberts Court from 2005 through 2008 provides a guiding light for judging the outlines of the answer to this question.<sup>196</sup> Professor Krishnakumar classified the interpretational methods of the Justices into a number of categories, of which, relevant to this Paper are "Text/Plain Meaning," "Practical Consequences," "Whole Act Rule" (which includes Superfluities), "Legislative History," and "Intent."<sup>197</sup>

Intent and Legislative History are by far the least often utilized tools among the justices when reaching a holding.<sup>198</sup> Text/Plain Meaning is the dominant mode of interpretation found, with eight Justices using it as one of their top three interpretative lenses.<sup>199</sup> While, Practical Consequences is a top three selection for six Justices, and the Whole Act rule is the third most popular interpretive lens for seven Justices.<sup>200</sup> Legislative History has only four Justices relying on it as part of their holdings, and of them it ranks second for one Justice, and third for three justices.<sup>201</sup> Intent enjoys the least

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193. Law & Zaring, *supra* note 134, at 1715.

194. William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 623 (1983).

195. Krishnakumar, *supra* note 114, at 279.

196. *Id.*

197. *Id.* at 231–32. In all Professor Krishnakumar examines 14 different interpretive schemes. However, as noted above, the likely conflict in a case over § 1201 will come between a side that relies upon a Plain Text or Legislative History approach against a side that relies upon the spirit of the Copyright Act or the practical consequences of § 1201 at large.

198. *Id.* at table 3. Each Justice was assigned a rank of the percentage of times they relied upon a particular interpretation device.

199. *Id.*

200. Professor Krishnakumar used the Whole Act Rule to describe the sense in which an Act must be viewed as a whole, and within the context of the law in which it operates. This includes the notion of superfluities addressed *supra* Part IV.a.ii.2.

201. *Id.*

popularity with just two Justices using it as their third most popular interpretive lens.

Further, the Ninth Circuit's extensive reliance upon legislative history may be unfounded. Concomitant with Justice Scalia's championing of the "new textualism,"<sup>202</sup> was the diminution of the practical effect of legislative history from his early time on the court. The overall reliance upon legislative history has been declining over time.

Brudney and Ditslear found that, when reaching decisions in statutory interpretation cases, Legislative History was featured only 29% of the time by 1986.<sup>203</sup> This was a decline from a high of between 40% and 50% in 1969.<sup>204</sup> According to Law and Zaring, by 2004, just 11.1% of opinions featured legislative history as a component in the holding.<sup>205</sup>

This evidence has only been reinforced by Professor Krishakumar's research showing the relative weakness of Congressional Intent and Legislative History as interpretive tools in recent Supreme Court decisions.<sup>206</sup>

However, it is important to note that a Supreme Court rescue of §1201 would not be out of step with the expectations of those who draft Congressional legislation, either. According to Professor Gluck, legislation drafters regularly assume that courts will construe statutes in a way that allows them to be upheld.<sup>207</sup>

Thus, pragmatically, it is most likely the case that the two pillars upon which the Ninth Circuit constructed its holding are not quite as solid as expected. Courts very rarely stop at the text—even obvious text. And when the analysis proceeds, it is increasingly rare for the decision to turn upon the weight of legislative history.

The Federal Circuit, on the other hand, takes the textualist and intentionalist view seriously, but remains focused on the larger context in which the law operates. It noted that the DMCA does not create a new *property right* for copyright owners, it merely allows for new grounds for liability.<sup>208</sup> This includes, of course, the trafficking in tools meant to aid in circumventing TPMs in order to access copyright materials and, as I have suggested above, could include the circumvention of a TPM as an intent to

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202. Eskridge, *supra* note 194, at 623.

203. James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 222 (2006).

204. *Id.*

205. Law & Zaring, *supra* note 134, at 1715.

206. Krishnakumar, *supra* note 114, at 279.

207. Gluck & Bressman, *supra* note 145, at 947–48.

208. *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1204 (Fed. Cir. 2004).

infringe.

The Federal Circuit's policy concerns are also very informative. Particularly within the field of embedded software products, allowing manufacturers of devices to prohibit use with competing products, §1201 would essentially grant manufacturers peculiar exemptions from anti-trust law and the copyright misuse doctrine.<sup>209</sup> Coupled with the observation that §1201 provides for a shortcut around the strictures of a suit brought under the CFAA, the no-nexus reading of the clause creates a troublesome set of legal loopholes. The broader goal of the DMCA was to rebalance the interests of the public against the rights of copyright holders in light of the expansion of digital media.<sup>210</sup> It is a mistake to construe the DMCA as creating expansive new property rights that allow a disruption of traditional rights of the public, including Fair Use and access to public domain materials.

### CONCLUSION

Assuming, for argument's sake, that the Ninth Circuit's preferred approach of textualism, supported by legislative history, is the proper way to view §1201, the problems outlined in Part I, *supra*, remain. Section 1201 is not clearly an enactment that is legitimate under the Copyright Clause power of Congress. Moreover, as a paracopyright enacted under the Commerce Clause, it will still likely be restricted as an exercise of Congress's Copyright Power.

However, as outlined in Part III, textualism will probably not be the end of a Supreme Court analysis of §1201 anyway. Further, based upon the empirical evidence, legislative history will not be the decisive factor in a Supreme Court ruling. This is of course leaving aside the fact that the Federal Circuit also offered support for its holding derived from a reading of legislative history.

The Ninth Circuit claims that §1201(a)—with its focus on mere access control—should be contrasted with §1201(c)—where the focus is on protecting particular rights under the Copyright Act. This is because, in the court's view, the distinction clearly suggests that §1201(a) was intended to create a new sort of right. However, this still does not rescue the Ninth Circuit's no-nexus approach. As noted by Professor Gluck, staffers will frequently overdraft statutes in order to make sure they covered their intended ground.<sup>211</sup> Further, as discussed *supra* at length, it could not have plausibly been the intention of Congress to create a property loophole in §1201, nor

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209. *Id.* at 1193.

210. *Id.* at 1194.

211. Gluck & Bressman, *supra* note 145, at 947–48.

could it have been the intention of Congress to require courts to parse the infinite variety of media in order to ascertain when a rights holder would be able to use §1201 for protection of their content. The Federal Circuit's infringement-nexus requirement is direct and focused, and solves the problem.

The textualist and intentionalist canons are read fairly with a nexus approach. Congress explicitly stated that it did not intend to alter rights by enacting the DMCA, and the clear language of §1201(a) states only a method of protection, and does not clearly state that a new property right was being created. Moreover, the policy concerns noted by the Federal Circuit – including the fear of disrupting access to the public domain and Fair Use, and a concern for providing an end-run around antitrust laws and the copyright misuse doctrine – create a compelling reason to acknowledge the nexus requirement.

The Ninth Circuit pointed out a valid superfluity concern in reading an infringement nexus into §1201.<sup>212</sup> The infringement-nexus approach could effectively prevent a new cause of action for the pure violation of the TPM, since, if there is an infringement anyway, there is no need for a cause for the TPM violation. However, this would only affect §1201(a)(1) since §§1201(a)(2) and 1201(b), which prevent the trafficking in such technologies, would still be operative. Persons who distribute technology that is intended to enable persons to infringe the copyrights of others would still be liable under §1201. While it may be argued that §1201(a)(1) becomes redundant, reading the law in this way actually avoids making the entire CFAA redundant by allowing §1201(a) to operate as a lower-requirement computer hacking law.

However, §1201 need not be redundant, even if there is an infringement nexus requirement. As suggested above, the circumvention of the TPM can amount to an “intent to infringe” when no actual infringement has occurred. In this view, if circumstantial evidence can be marshalled that demonstrates the circumventer was actively trying to infringe upon a protected work when bypassing the security mechanisms, there could be a cause of action. There will still be an action for pure circumvention, and there will be an infringement nexus—§1201 continues to function in a way that does not generate new property rights, but merely affords a new method of enforcing existing rights.

However, even granting the Ninth Circuit its superfluity concern that concern is far from the only such superfluity concern to apply to the DMCA. Without an infringement nexus, a major portion of the CFAA is rendered duplicative. Further, if Congress were to rely solely upon its Commerce power to extend a paracopyright copyright unmoored from the strictures of

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212. *MDY Indus., LLC v. Blizzard Entm't Inc.*, 629 F.3d 928, 946 (9th Cir. 2010).

the Copyright Clause, the Copyright Clause would be reduced to a nullity. To adopt the Federal Circuit's infringement nexus requirement is to more carefully constrain the operation of §1201. It would retain the existing balance of rights in the Copyright Act and under the CFAA, and would avoid the absurd consequences of turning the Copyright Act into a general computer hacking statute.