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THE NEW ACCESS RIGHT AND ITS IMPACT ON LIBRARIES AND LIBRARY USERS

Laura N. Gasaway*

I. INTRODUCTION

The 1998 Digital Millennium Copyright Act (DMCA) added to the exclusive rights of copyright owners a right of access. There continues to be some debate about whether the DMCA actually created a right of access, but it appears to me that it has, whether directly or indirectly. The reality for libraries and library users is that copyright owners can apply technological protection measures to their works and, through the anti-circumvention provision of the DMCA, have the means to control access. The DMCA ensured that the legal system would support this right by making it illegal to circumvent a protection measure. Whether this is truly a new right or whether it is inherent in the migration from analog to digital works, the impact on libraries and the users of these works is the same: digital works will not be freely available in libraries, and by controlling access, copyright holders may also control use of the work.

In the past, the users of copyrighted works had a variety of means to obtain access to these works and the information contained therein. A reader could purchase a copy of the work, borrow it from someone who owned a copy, go to a library and either use a copy of the work in the library or even check it out from the library's collection and take the work home to use in private. As more and more works are available in digital format, copyright owners are either licensing access to the material or using technological protection measures to control access to their works. Mary M. Case noted that "as the laws change to secure content for publishers, there is a negative impact on those in the educational and research communities where the creation, dissemination, and use of intellectual property is expected and, in fact, forms the very core of learning and research." Licensing also raises serious issues for libraries, especially licenses that offer only "take it or leave it terms" and permit little or no negotiation. However, licensing is generally outside the scope of this Article.

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An access right is defined as “[p]ermission for a subject to access a particular object for a specific type of operation. An example of an access right is the permission for a process to read a file but not write to it.”\textsuperscript{3} It is also “the right to control the manner in which members of the public apprehend the work.”\textsuperscript{4} Access controls could include control of the price the user pays to acquire access. Additionally, access price could include the number of persons who may hear or view the work, the number of computers on which the work may be used, how long access to the work may be available, and similar restrictions.\textsuperscript{5}

The right of access on behalf of copyright proprietors raises significant concerns for libraries and their patrons in their efforts to access and use copyrighted works. Libraries acquire copyrighted books and materials and have traditionally made them available to library users. The first sale doctrine permits libraries to lend their copies of copyrighted works to users without seeking permission or paying fees to the copyright holder.\textsuperscript{6} Access controls have the potential to disrupt traditional library service by converting access to materials to a pay-for-use system regardless of the purpose of the user who is accessing the work. Although libraries could fund access for all of its patrons, the reality of library budgets makes this highly unlikely. Thus, individual library users are likely to have to pay for their access or for various levels of access which will create a world of information haves and have nots. Additionally, access controls could eliminate the first sale doctrine, although it is arguable that the first sale doctrine may be meaningless, in any event, in a pay-for-use world.\textsuperscript{7}

In the past, I have written about the values conflict between content providers and librarians, and I have pointed out the difference in the use of certain terminology by these groups to describe both copyright and basic library operations.\textsuperscript{8} When I began this Article, I knew that content producers and libraries had different values regarding access to information, but I had no idea that once again I would encounter a difference in basic terminology. For years, librarians have championed the public’s right of access to government informa-

\begin{footnotes}
\item[5] Id.
\end{footnotes}
tion, not only in this country but around the world. For this reason, the term "right of access" is problematic to me as a librarian. Others also find it problematic for a variety of reasons. For this Article, the term "right of access" or "access right" will refer to the right of the copyright holder to control access and use of a work that is provided in section 1201 of the DMCA.

This Article first addresses the purpose of copyright law and its impact on libraries. This section is followed by an analysis of whether there is a right of access in European law. The third section examines the development of section 1201 in the United States followed by an analysis of section 1201 of the DMCA and its exemptions. Finally, this Article addresses the impact of anti-circumvention on libraries and library users and concludes with a couple of their views of the future.

In order to understand the import of section 1201, it is important to consider the right of access more broadly and look at the European antecedents of the right.

II. DEVELOPMENT OF THE RIGHT OF ACCESS

A. GENERAL BACKGROUND

The U.S. Constitution states that: "[t]he Congress shall have the Power... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." In their work The Nature of Copyright, Ray Patterson and Stanley Lindberg identify the policies embodied in this clause, namely the promotion of learning, preservation of the public domain, and protection of the author. Additionally, they believe that there is also an inherent fourth policy, an implied right of access, by which authors agree to make their works available to the public in exchange for the exclusive rights that copyright provides. Promotion of


10 See infra notes 16-19 and accompanying text.


13 Id. at 52-55.
learning is dependent on the right of access principle identified by Patterson and Lindberg. In the past, the various U.S. copyright acts furthered this principle by conditioning the availability of copyright protection on publication. Patterson and Lindberg believe that "[c]opyright entails the right of public access as a quid pro quo for the benefits received by the copyright owner in the statutory grant of monopoly rights." Thus, a decade ago the "right of access" referred to the public availability of the work protected by copyright, not the right to control, restrict or prohibit access to a lawfully acquired copy.

Public access to published works is a traditional goal of copyright law. In the past, printed publication provided sufficient copies of a work through libraries or individually purchased copies to ensure this access. Further, everyone seemed to understand that the social and cultural record contained in these works would continue to be preserved, most often by libraries. This shared norm concerning the availability of published works is now being challenged as more publishers and producers are reluctant to permit public access to their works since their economic interests could be harmed. Libraries recognize the potential for economic harm to publishers but firmly believe that works should continue to be available to researchers when their purposes are study and research, purposes that clearly are in the public interest. The potential for a pay-for-use system to control the availability of works is gaining ground, however, and information may be made available only to persons who can pay for it, but, which, because of technological protections, is not easily shared.

Some writers dispute whether either "right of access" or "access right" is even a useful term. Traditionally, access means the way into a place, a limited and closed space which has a way in. So, access must be used in this context as a metaphor. Given the freedom of information context in which the right of access is normally used, it seems to be a somewhat misleading term since here it means the right to restrict public access. In this context, right of access clearly means the copyright holder's right to control access to a work. Thomas Heide stated
that "[a]s the ability to order, limit, instruct, or rule something or someone's actions or behaviour is inherent to the definition of 'control', what is in issue with the 'access-right' is not only the ability to grant or authorise initial access... not only for a general purpose but also for specific ones." Therefore, the right of access likely includes the right to control use also. Thus, it is not the user's right to obtain access to the material but the copyright owner's right to control access. Whether it is called an "access right" as opposed to the "right of access" does not seem to solve the terminology problem either. There simply is some confusion over the meaning of the term, and it likely will continue for some time.

Digital Rights Management (DRM) is a form of access controls. DRM systems may be defined as systems that use software to provide licensing more or less "on the fly" or "databases that streamline the complex relationships and transactions among rights, works, and parties." More fundamentally, for the users of copyrighted works, DRM provides a convenient way to obtain permissions, and for rightsholders, it provides a way to control how a work may be used and ensures payment for the use. Some DRM systems do even more and incorporate specifications for use of a digital work into the work itself using technologies such as encryption.

On the other hand, DRM may be just another way to protect copyright. Users of copyrighted works interact with DRM systems when requesting copies of works. Software may control access to the work, the royalty to be charged, the user's billing and account information, and the process of actually sending the copy to the user. The development of digital rights management systems illustrates the power of technology and its ability to control behavior. Technological controls also demonstrate how private individuals can override statutory protections afforded the users of copyrighted works, such as fair use. Digital rights management systems are one such technology which can control behavior.

The right of access has its antecedents in the right of first publication, which ensures that no one can publish an unpublished work without permission of the

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20 Id.
22 Id.
24 See Davis, supra note 21.
author. It is the author who should determine whether the work is to be published at all and if so, to benefit from any income that the work may earn. The right of first publication is a type of access control, since the copyright holder may decide to prohibit access to the work by not publishing it and making it publicly available. But the right of first publication is really only the right of first access.\(^\text{26}\) The seeds of an access right might also be found even before the development of the Internet with RAM copying and the fact that a copy in RAM constitutes making a copy.\(^\text{27}\)

Proof that an access right now exists in the United States may be found in that at least one court has held that it does provide an access right. In *Los Angeles Times v. Free Republic*,\(^\text{28}\) a case that dealt with the reproduction and posting of the full-text of newspaper articles on a website for comment by Internet users, the court stated that copyright holders have the "right to control" access to their copyrighted works.\(^\text{29}\) The court did not cite section 1201 or any other section of the Act to support this statement, however.

## B. DEVELOPMENT OF THE RIGHT OF ACCESS IN EUROPE

Many people assume that the reason the United States has implemented a right of access is because it either exists in the law of various European countries or due to treaty obligations.\(^\text{30}\) Just as the U.S. statute does not specifically mention a right of access, neither do various copyright treaties. Neither the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT)\(^\text{31}\) nor the Berne Convention\(^\text{32}\) announces a right of access. Both the WCT and the WIPO Performances and Phonograms Treaty,\(^\text{33}\) however, do provide for the protection

\(^{26}\) See Hoeren, *supra* note 17, at 4.

\(^{27}\) See Ginsburg, *supra* note 4, at 7-8. There may even be roots of the right of access in the Roman law of possession. See Hoeren, *supra* note 17, at 4-5.


\(^{29}\) Id. at 67-68.

\(^{30}\) It should be noted that the European Copyright Directive was not passed until May 2001, more than two years after the DMCA was enacted in the United States.

\(^{31}\) See World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, art. 8, S. Treaty Doc. No. 105-17 (1997), available at http://www.wipo.org/eng/diplconf/distrib/94dc.htm (stating that authors enjoy the exclusive right of making their work available to the public from a place and time picked by the authors) [hereinafter WCT].


\(^{33}\) See World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, art. 8, S. Treaty Doc. No. 105-17 (1997), available at http://www.wipo.org/eng/diplconf/distrib/95dc.htm (stating that performers have the exclusive right of authorizing the availability of
of technological measures as long as those measures themselves do not interfere with provisions in the national copyright law that provide exemptions for users. The WCT also articulates the right of communication to the public

authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.34

This language appears to put the access choice in the hands of the public. It is likely, however, that the copyright owner has the right to control how that access to the public occurs.35

The European Parliament passed several directives that attempt to balance the rights of producers of copyrightable materials and the users of such materials in the European Union (EU). The new technology has also created new and easily copyable formats that drive the desire on the part of copyright holders to enact a right of access. The four directives that currently relate to a right of access include the Computer Program Directive, Database Directive, Conditional Access Directive and Copyright Directive. None of these directives contain a specifically identified right of access, but each contributes to the overall scheme of access regulations in the EU.

The European Parliament and Council enacted the Computer Program Directive (CPD) on May 14, 1991, to be implemented by all Member States by January 1, 1993.36 CPD requires Member States to provide copyright protection for computer programs. It grants the common exclusive rights of reproduction, adaptation and distribution to the rightsholder.37 The directive reserves several rights or exceptions for users of the computer programs, including: error correction, the making of a single back-up copy, examination of the program to determine the operating principles and idea of the program38 and decompilation of the program in order to achieve interoperability with another program.39 The right of decompilation is sometimes referred to as an access right in Europe, but

their work to the public).

34 WCT, supra note 31, art. 8.
35 See Ginsburg, supra note 4, at 8.
37 Id. art. 4, at 44.
38 Id. art. 5, at 44.
39 Id. art. 6, at 45.
it is a right on behalf of the public, not the copyright holder. Thus, the right does not have the same meaning in which the term is used in this Article. Similarly, article 4(c) provides for the application of the first sale doctrine to computer programs.

The Database Directive (DD) was passed on March 11, 1996, to be implemented by all Member States by January 1, 1998. The DD attempts to harmonize database protection legislation, for electronic and non-electronic databases, throughout the Member States. This directive aims to provide an incentive to database creators by protecting their financial and professional investments in “slavish copying” of their databases. It accomplishes this goal by specifically providing databases with copyright protection, with the corresponding rights of reproduction, distribution, adaptation and communication to the public, as well as providing for a sui generis right. Specifically exempted from database protection are CD compilations and computer programs used to build databases. Normal copyright laws, not the DD, cover the underlying works that compose the content of the database. The DD applies only to Member States residents and residents of countries with reciprocal agreements to recognize EU database protection in a substantially similar manner.

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41 Id.
42 Computer Programs Directive, supra note 36, art. 4(c), at 44. The first sale doctrine refers to the user’s right, after lawful purchase, to distribute the original in whatever manner he or she so chooses. Art. 4(c) amends this doctrine by disallowing rental and further copying of the program. Id.
44 Id. art. 16(1), at 27.
45 Id. art. 14, at 27.
47 Database Directive, supra note 43, art. 3(1). Specifically, this article states, “[D]atabases which, by reason of the selection or arrangement of their contents, constitute the author’s own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.”
48 Id. art. 5.
49 Id. § (19).
50 Id. art. 6(2)(a) & 1(3). Art. 1(3) § 23 specifically notes that computer programs used to build databases are exempt because the Computer Program Directive protects the program separately under copyright law.
51 Id. art. 13.
52 Database Directive, supra note 43, art. 11(1).
The European Parliament and Council passed the Conditional Access Directive (CAD) on November 20, 1998. Implementation of CAD by all Member States occurred no later than May 28, 2000. It harmonizes anti-circumvention law for protected service providers whose service is limited by conditional access. The services protected include television broadcasting, radio broadcasting and "information society services." The "manufacture, import, distribution, sale, rental . . . possession . . . installation, maintenance . . . replacement of . . . [or] use of commercial communications to promote" "illicit devices" that bypass technological security measures protecting service providers are prohibited for commercial gain, where "illicit device" means "any equipment or software designed or adapted to give access to a protected service in an intelligible form without the authorisation of the service provider." CAD requires the element of actual or implied knowledge. CAD does not protect against circumvention for noncommercial purposes, however.

Partially conflicting with the prior restrictions on illicit devices is Article 3(2), which restricts Member States from interfering with the "provision of protected services, or associated services, which originate in another Member State" and the "movement of conditional access devices." With today's cross-border services, it may be difficult to determine where a service originates. Also, conditional access devices may be hard to differentiate from illicit devices. For example,

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54 Id. art. 6(1).
55 Id. art. 2(a). The definition for "information society services" refers to EU document 98/34/EC, which is a directive "laying down a procedure for the provision of information in the field of technical standards and regulations." Id. The specific section referred to, Art. 1(2), does not mention "information society services," but rather provides the definition for "technical specification." Id. Jacques de Werra interprets "information society services" as "all kinds of on line conditional access services (online brokerage, banking, healthcare, travel agency, distance learning, etc.) . . . [as well as] intellectual property products (pay-TV; video-on-demand; electronic publishing)." Jacques de Werra, The Legal System of Technological Protection Measures under the WIPO Treaties, the Digital Millennium Copyright Act, the European Directives and other National Laws (Japan, Australia), ADJUNCTS AND ALTERNATIVES TO COPYRIGHT, ALAI 2001 CONGRESS 198, 228-30 (2002).
56 Conditional Access Directive, supra note 53, art. 4(a), (b), (c).
57 Id. § (13).
58 Id. art. 2(e).
59 Id. § (22).
60 Id. art. 3(2).
61 Conditional access device is defined as "any equipment or software designed or adapted to give access to a protected service in an intelligible form." Conditional Access Directive, supra note
much software includes an update feature so that authorized users may update their software for a limited time. Also available online, however, are small software programs, often referred to as "cracks," which may integrate into the original software program to trick the authentication process into allowing illicit access to protected services and materials. While the two programs are easily identifiable individually, the integrated version may cause identification problems.

On May 21, 2001, the Copyright Directive (ECD) was passed. The directive is designed to harmonize the member states' copyright and related rights laws, as well as bring the European Union in line with the World Intellectual Property Organization Copyright Treaties. The ECD is divided into two main parts: Copyright and Anti-circumvention Measures. The ECD requires member states to grant the traditional exclusive rights of reproduction and distribution to the creator.43 Related to these traditional rights, the right of communication/making available to the public of works and other subject matter via digital means is also granted exclusively to creators.44 Exceptions to these rights are arranged by the specific right(s) and some relate specifically to libraries.

The reproduction right has one mandatory exception and five optional exceptions.45 All Member States must allow for "temporary acts of reproduction . . . which are transient or incidental [and] an integral and essential part of a technological process."46 In other words, temporary copies created in order for a computer program to operate properly, such as copies produced in computer RAM, must be provided with an exception.47 The optional exceptions on the reproduction right include paper or similar medium reproductions, excluding sheet music, so long as fair compensation is provided to rightsholders; reproduction on man-made mediums for noncommercial, private use, with fair compensation to rightsholders; noncommercial reproductions by public libraries, educational institutions, museums, or archives; official archives of individual

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53, art. 2(c).
63 Id. art. 2 & 4.
64 Id. art. 3.
65 Optional exceptions are adopted by individual Member States.
66 Id. art. 5(1).
67 This prevents a rightsholder from claiming infringement every time an Internet browser, such as Internet Explorer or Netscape Communicator, accesses the webpage that contains the rightsholder's copyrighted work. This does not mean that temporary copies produced by such methods are not considered copies or reproductions as traditionally defined; this only means that such copies cannot be the basis for copyright infringement under this directive so long as they meet the specific requirements of Article 5(1).
broadcasters of their own works; and noncommercial reproductions of broadcasts by social institutions, with fair compensation to rightsholders.68

There are fifteen exceptions for the combined rights, and all are optional. An emphasis on noncommercial usage and attribution to the author are common themes,69 and many aspects of fair use are covered in these exceptions. Exceptions cover topics such as teaching or scientific research, uses related to benefiting people with a disability, news reporting, quotation for criticism or review, caricatures and parody, religious or official celebrations, and research or private study of non-purchasable or non-licensable works. There are also distribution rights exceptions. Member States have the option of providing exceptions similar to those available for the reproduction and communication to the public rights under the DD.70 Additionally, there is one mandatory exception that applies to the distribution right: the first sale doctrine.71

The anti-circumvention provision requires Member States to pass anti-circumvention laws, similar to the United States' Digital Millennium Copyright Act.72 Such legislation must encompass: the act of circumvention and the "manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services" which have limited non-circumvention uses.73 These provisions apply only to technological measures that prove effective.74

The ECD promotes the creation of voluntary measures by the rightsholders and users.75 Member States must step in if voluntary agreements are not forthcoming or in order to ensure that the specified beneficiaries or users have access to the exceptions passed into law.76 Works "made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them" are not protected by these anti-circumvention provisions.77 In other words, the anti-circumvention

68 Copyright Directive, supra note 62, art. 5(2)(a)-(e).

69 Further restrictions may apply to specific exceptions. The totality of the exception details are beyond the scope of this Article.

70 Id. art. 5(4).

71 Id. art. 4(2).

72 Id. art. 6(1).

73 Id. art. 6(1) & (2).

74 Copyright Directive, supra note 62, art. 6(3). Effectiveness is defined as "where the use of a protected work or other subject matter is controlled by the rightsholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective."

75 Id. §§ (51)-(53) & 17-18, art. 6(4).

76 Id.

77 Id. art. 6(4).
provisions do not cover works that contain a contractual license and are available via the Internet or peer-to-peer networks.

There are two major problems with the ECD. First, a tension exists between the ECD's proclaimed goal of harmonization of laws among the Member States and the structure of the directive itself. The majority of exceptions in the ECD are optional, so different exceptions will exist in different Member States, and laws of Member States will not be truly harmonized. Individuals will still have to examine individual Member States' laws to determine which exceptions apply in which jurisdiction. The differences in laws may cause rightsholders to be wary of releasing their works in certain jurisdictions and may promote users to select certain jurisdictions to partake in usage of works due to differing exceptions. Second, the use of anti-circumvention laws is severely limited due to restrictions on the format of the usage (i.e., not applicable to works with contractual licenses on public digital networks). One of the primary applications of copyrighted materials today involves use of licensing via the Internet. Removing protection from such materials may harm rightsholders; though many users, lawful and unlawful, may find these provisions very satisfying.

The Copyright Directive specifically states that a balance must be struck between rightsholders and users. Thus, this directive, enacted after the DMCA, contains language similar to section 1201's anti-circumvention provision.

C. DEVELOPMENT OF THE RIGHT OF ACCESS IN THE UNITED STATES

Congress has frequently acted to amend the statute when new technology demanded a response in order to protect copyright proprietors, for example, by adding sound recordings to the list of protected works in 1972 (a rather late addition), by providing compulsory licenses for cable and satellite television for the performance of music in the 1976 Copyright Act, and by providing for a digital performance right for sound recordings in 1995 and 1998. With the move from an analog world to a digital one, adding a right of access is consistent with these earlier expansions of rights and protections for copyright holders. The legal framework that section 1201 should provide copyright holders with sufficient protection to make their works available over the Internet supports a variety of e-commerce business models. Access controls make it possible for

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78 Id.
79 Id. § (31).
82 Id. § 106(6).
83 Ginsburg, supra note 4, at 9.
84 J.T. Westermeier, Fair Use vs. Anti-Circumvention Provisions under the DMCA, in PLI’s SEVENTH
copyright proprietors to offer their products at a variety of prices based on the level of use. Such controls also foster the development of new forms of distribution and charging based on a user's level of consumption.85

Section 1201 of the DMCA contains three major provisions designed to protect technological controls that copyright owners may use to restrict both access and use of their works. Circumvention is defined in section 1201(a)(3)(A), which provides that "to circumvent a technological measure means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner."86 Subsection (a)(1) is referred to as the act of circumvention provision and (a)(2) as the business of trafficking in circumvention technology subsection.

1. Section 1201(a)(1)—"No person shall circumvent a technological measure that effectively controls access to a work protected under this title."87 This is the subsection that prohibits the act of circumvention, i.e., the use of such devices to circumvent access controls.

2. Section 1201(a)(2)—"No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that . . ."

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.88

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85 Ginsburg, supra note 4, at 10.
This provision is often referred to as the trafficking provision, but it also prohibits the manufacture and importation of devices that are designed primarily for the purpose of circumventing access controls. How much of a limitation section 1201(a)(2)(B) provides, remains to be seen. In Sony v. Universal Studios, the U.S. Supreme Court held that an infringing device which had substantial noninfringing uses would not give rise to contributory infringement. In the few anti-circumvention cases to date, however, it appears that no amount of noninfringing use satisfies this section as long as the device is being used to circumvent controls.

3. Section 1201(b)(1)—“No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that ... effectively protects a right of a copyright owner under this title in a work or a portion thereof.” This subsection is similar to (a)(2), but its language regarding rights of the copyright holder deals not with access but with infringing use of the copyrighted work such as through reproduction or distribution. This is the provision regarding use controls. Thus, section 1201 prohibits circumvention of both access and use controls.

Subsection (a)(1) focuses on the use of devices that circumvent access controls while (a)(2) deals with devices or services that may be used to circumvent access controls. Generally, “[access controls are given the greatest protection under the DMCA’s anti-circumvention provision.” What constitutes effectively controlling access to a work is defined as a measure that “in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.” It has not yet been determined whether an access control that fails to work qualifies as “effectively controlling access to a work,” and one certainly could argue that it does not.

The language of the statute itself does not mention a right of access per se; instead, in U.S. law, technological access controls are protected by the statute. There is no right to control access absent the use of technological protection measures implemented by the copyright holder to control access. So, an access right must flow from this, and indeed this appears to be the case.

91 Id. at 442.
92 See Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 321-24 (S.D.N.Y. 2000) (holding that defendants failed to establish that anti-trafficking provision was overbroad on the grounds that it prevented noninfringing fair use).
93 Westermeier, supra note 84, at 284.
95 Bing, supra note 40, at 301.
1. Rulemaking. As originally enacted, section 1201 contained a provision to create liability for individual conduct in actually circumventing technological controls, but the provision was not effective immediately as were the other portions of the anti-circumvention statute. Instead, the Librarian of Congress was charged to conduct a study two years after the effective date of the DMCA (October 28, 1998). The Librarian was directed to consult with the Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce in order to determine “whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition . . . in their ability to make noninfringing uses . . . of a particular class of copyrighted works.” 96 The statute listed a number of issues that were to be considered in the study such as the availability of copyrighted works for use, the availability for use for nonprofit archival, preservation and educational purposes, and the impact that circumvention technologies would have on fair use and on the market value of such works. 97 The House Report that accompanied the Act envisioned that the list of exempted classes of copyrighted works would be a “narrow and focused subset” of the broad section 102(a) categories of protectable works of authorship. 98

The Register of Copyrights was assigned responsibility for the rulemaking and to that end held two hearings, one in Washington, D.C. and one in Palo Alto, California, in the spring of 2000 where representatives of library and educational associations testified along with representatives of publisher and producer organizations. The results of the rulemaking proved to be problematic for libraries and consequently for their patrons.

The Copyright Office interpreted the statutory language that defined the scope of its authority to conduct the rulemaking narrowly to focus only on current adverse affect experienced by various groups because of publisher and producer implementation and use of technological measures to control access. 99 This interpretation made it difficult for users of copyrighted works who testified in the hearings because it required some proof of current harm. Although the statutory language permitted focus on users of copyrighted works who were likely to be adversely affected within the next three years, the Copyright Office chose another interpretation, i.e., current adverse effects only. To some extent, the focus on current affect of the harm caused by such controls meant that it would be too late

97 Id.
from the users’ perspective: the harm would have already been suffered. While groups testifying were permitted to discuss likely adverse affect, the Office apparently discounted this testimony in the actual rulemaking by its focus on actual harm.

Because of the short time period between the enactment of the DMCA and the hearings, and because so few publishers and producers had actually implemented technological controls, librarians and others were unable to present much evidence of current harm. To date, the access controls that have actually been used include passwords, encryption for certain types of works and date expiring content. Although some difficulty with passwords and authentication, especially for off-campus users, was reported, this was minor and is something that libraries are able to negotiate with publishers since passwords apply primarily to licensed products such as databases, full-text electronic journals, and the like. In the main, encryption technology has been applied primarily to works for entertainment such as motion pictures in DVD format. Works with date expiring content have included both CD-ROM and online databases.100 Certainly, publishers and producers may implement other types of access controls in the future, and it is difficult to assess the likely impact on libraries and educational institutions of these access controls. Access controls are likely to focus on the individual rather than the institutional user. Hopefully, publishers and producers will take into account institutional uses of works in addition to uses of an individual in designing and implementing access controls.

The rule announced by the Copyright Office details only two classes of works that are exempted from the anti-circumvention prohibition: (1) “[c]ompilations consisting of lists of websites blocked by filtering software applications; and (2) [l]iterary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence.”101 While there is nothing wrong with exempting these classes, the exemptions are so narrow as to be almost meaningless. The first exemption applies only to users who want to evaluate websites for purposes of criticizing them, and access controls have an adverse affect on the ability to do this. The purpose of the second exemption is to permit users, including libraries, to have access to the works for which they have paid, but for which some malfunction interferes with this use.


101 Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 FED. REG. at 64562.
Both library and education associations testified that they did not believe that it was possible to separate the class of work from the use that would be made of those works. Traditionally, in U.S. copyright law, there are broad exemptions to the exclusive rights of the copyright holder for certain uses of copyrighted works by nonprofit educational institutions and libraries. For these users, separating the use to be made of a work from the class of work is impossible.

The higher education community suggested that two classes of works might be exempted for nonprofit educational and library use: fair use works and those with thin copyrights. Fair use works were defined as those such as scientific and social databases, textbooks, scholarly journals, academic monographs and treatises, law reports and educational audiovisual works. Exempting these classes should be tied to the user who is likely to make fair use of them. Further, these works are the most likely to be used in teaching and learning. Thin copyright works are defined as works such as scholarly scientific journals, databases, maps, and newspapers. These works are valuable because of the information they contain, and "information" is not protected under the copyright law. Additionally, the higher education associations supported the concern of libraries about preservation of digital works.

Libraries sought a much broader exemption because of the recognition that technological controls can and will not only control access to works but the use of those works. This can destroy the first sale doctrine as well as fair use. Libraries were also concerned about the preservation of digital information and technological controls that might prevent libraries from fulfilling their roles as the repository and preserver of information. These concerns prompted proposals that the exemption should apply to works embodied in copies which have been lawfully acquired by users who subsequently seek to make noninfringing uses thereof.

The narrowness of the resulting rule is of great concern to the library community while copyright holders have stated that they did not believe even

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103 See Gasaway Testimony, supra note 100.

104 See Wiant Testimony, supra note 102.

these two exemptions are needed. Library associations expressed the fear that pay-for-use now will become the norm with practically no controls, and this eliminates fair use and the other exemptions to copyright which have long protected the public and served the public interest. The library and education communities recognized that there are many problems with the existing anti-circumvention statute, and perhaps it was unrealistic to hope that the Copyright Office's rule making could undo some of the harm the community perceives will be caused by publisher and producer activity. Others, such as the Digital Future Coalition, believe that the rule failed to satisfy the Congressional concern that traditional fair use in the digital environment be preserved, a view supported in this rule-making proceeding by the Assistant Secretary for Communications and Information in the Department of Commerce.

2. Exemptions to Section 1201. There are a number of important exemptions contained in the anti-circumvention provision. These range from law enforcement to encryption research and even includes one for libraries. Some of the exemptions are addressed below.

The library exemption applies to both nonprofit libraries and archives, which gain access to commercially exploited works solely for the purpose of making a good faith determination about whether or not to acquire the work. This will be exempted if two conditions are met: (1) the library retains access only for a reasonable time in order to make a decision about acquiring access and (2) the access so acquired is not used for commercial advantage. This exemption, which applies only to anti-circumvention actions and not to the device prohibitions, has been referred to as the "shopping right" for libraries. During debates...

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108 The DFC consists of 38 national organizations representing libraries and education associations, computer and telecommunications businesses, archivists, authors and scientists. See http://www.dfc.org/dfc1/Learning_Center/members.html.


110 Letter from Assistant Secretary of Commerce for Communications and Information, conveying the views of the National Telecommunications and Information Administration (Sept. 29, 2000), at http://www.copyright.gov/1201/commerce.pdf.


112 Jane C. Ginsburg, Copyright Legislation for the "Digital Millennium", 23 COLUM.-VLA J.L. & ARTS...
and hearings, librarians cited the inability to examine works which had technological protections attached to them, even for the purpose of determining whether to purchase the work, as a reason not to enact section 1201.\footnote{Conversation with John Vaughn, Executive Vice President, Association of American Universities (May 18, 2000).} Congress sought to ameliorate this concern with this exemption. In reality, this exemption is practically useless to libraries and nonprofit educational institutions since publishers and producers virtually always give such institutions access under restrictive conditions so that the library can actually use the product in order to make a determination about whether or not to acquire the work. These conditions might include restrictions on who can use the product during the test period, the length of the time it is available, etc. With this access, it makes little sense for a library to consider circumventing technological protections to obtain the same access that it could get without the threat of prosecution.

Another exemption is for law enforcement. This exemption covers various law enforcement activities including intelligence and other government activities relating to law enforcement and applies to either the use of circumvention devices or manufacturing, trafficking, etc. It also applies to government contractors engaged in law enforcement activities under the contract.\footnote{17 U.S.C. \S 1201(e) (2000).}

There is also an exemption for reverse engineering for interoperability, but it is limited to the "sole purpose of identifying and analyzing those elements of the program that are necessary to achieve interoperability of an independently created computer program with other programs."\footnote{Id. \S 1201(f).} This language is derived from Article 6 of the European Union Software Directive. The reverse engineering exemption is not intended to permit defeating access controls in order to make infringing copies of works; in other words, such decompilation must be permitted under the Copyright Act in order for this exemption to apply.\footnote{See Westermeyer, supra note 84, at 292.}

The exemption for encryption research is restricted to research that may be characterized as good faith or legitimate encryption research. For purposes of the statute, encryption research is defined as the activity "necessary to identify and analyze flaws and vulnerabilities of encryption technologies applied to copyrighted works."\footnote{17 U.S.C. \S 1201(g) (2000).} The activities must be aimed at advancing the knowledge in the field or to assist in the development of encryption products. It also requires that the person engaging in such research have lawfully obtained a copy of the encrypted

\footnote{137, 148 (1999).}
\footnote{Id. \S 1201(0.}
\footnote{116 See Westermeyer, supra note 84, at 292.}
\footnote{117 17 U.S.C. \S 1201(g) (2000).}
work and that he or she tries to get authorization prior to engaging in the circumvention.\textsuperscript{118}

There is also a fair use exemption to the anti-circumvention provision, but there are serious questions about its viability. This is a huge concern for libraries and other members of the user community. Fair use has been embodied in the statute since passage of the 1976 Act,\textsuperscript{119} and section 1201 states that other rights are not affected: "[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use . . ."\textsuperscript{120} Despite this statement, how does one exercise fair use without having first acquired access? What if the access control also contains a restriction that prevents criticism of the work? Or no quoting from or reproduction of the work? Or no comparison with other similar works? These clearly are fair uses and are a use control but may be coupled with access control.

Moreover, the statute appears to set out circumvention as a cause of action that is separate from copyright infringement.\textsuperscript{121} Jane Ginsburg stated that "[c]ircumventing a technological protection measure for the purpose of exercising fair use rights is punished as a crime under section 1201(a)(1)."\textsuperscript{122} At least one court has said that there is no fair use of access; instead, the fair use defense applies only when the access is authorized.\textsuperscript{123} Presumably, one could exercise fair use after obtaining lawful access if the technological protection permits repeated access and does not embody use controls that would restrict reproduction or other actions that would be fair use under a traditional fair use analysis. Jacques De Werra has said that "[w]here access is undertaken for purposes of engaging in other uses—reading, for instance—it remains outside the scope of the copyright owner's power to control access."\textsuperscript{124} And yet, this is precisely what the statute permits. Even though the DMCA distinguishes between access controls and use controls, and fair use applies only to use,\textsuperscript{125} a single product might control both.\textsuperscript{126}

3. Remedies. The anti-circumvention provision has both civil and criminal remedies, but they are not the same remedies contained in the rest of the

\textsuperscript{118} Id.
\textsuperscript{119} Id 8 107.
\textsuperscript{120} Id 8 1201(c)(1).
\textsuperscript{121} Ginsburg, supra note 4, at 14.
\textsuperscript{122} Rick Boucher, The Future of Intellectual Property in the Information Age, in COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE 95, 98 (Adam Thierer & Wayne Crews eds., 2002).
\textsuperscript{123} In Reimerdes, Judge Kaplan took the position that the right of fair use exists but not the right of fair access. See Universal City Studies, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 323.
\textsuperscript{124} Heide, supra note 19, at 367.
\textsuperscript{125} de Werra, supra note 55, at 212.
Copyright Act. These remedies include both temporary and permanent injunctions, impoundment of any devices or products, actual, statutory and treble damages. The statutory damages are unique for circumvention. For each violation, statutory damages may range from $200-$2500 per act of circumvention or per device, product or component, as the court considers just. The Act also provides for reduction of damages if the violation was innocent; damages may be remitted if the nonprofit library, archives, educational institution or public broadcasting entity is not aware that its acts constituted a violation. The anti-circumvention provision also provides criminal penalties that include fines and imprisonment when the violator does so for purposes of commercial advantage or private financial gain. Such an individual may be fined up to $500,000 and imprisoned for no more than five years, or both for the first offense. For subsequent offenses, the fine can reach $1 million and imprisonment of not more than ten years. The criminal penalties do not apply to nonprofit libraries, archives, educational institutions or public broadcasting entities. For the criminal remedies, the statute of limitation is five years as opposed to the usual three.

In the first test of the criminal provisions of the DMCA, the jury acquitted the defendant. In United States v. ElcomSoft, a Russian software company faced four charges of criminal copyright infringement under the anti-circumvention provisions. An employee of the company, Dimitry Sklyarov, was arrested in July 2001 at the Defcon hackers conference in Las Vegas when he spoke about the company’s software that would defeat the Adobe eBook Reader. The software was posted on the company’s website, but it was removed when ElmcomSoft learned about Adobe’s concern. The jury foreman stated that the jurors believed the software posted was illegal but that the company had no intent to violate the law. This represents a serious setback for proponents of the anti-circumvention provision. It is unclear what this means for future criminal prosecutions because the issue was willfulness on the part of the defendant. Many scholars closely watched this case since it was the first major case under the criminal

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128 Id.
129 Id. § 1204(a).
130 Id. § 1204(b).
131 Id. § 1204(c).
132 Decision handed down on December 17, 2002 (Earlier motion to dismiss denied, 203 F. Supp. 2d 1111 (N.D. Cal. 2002)).
provisions of the statute. Further, Sklyarov testified that he created the software as a part of his dissertation.134

III. GENERAL CRITIQUE OF SECTION 1201

There are a number of critiques of technological protections and the fact that they are re-ordering the nature of the relationship between the government's grant of copyright to authors and publishers and the control of protected works through private action.135 When the integrity of content control is backed by the government's enforcement powers, "the legal enforcement of rights also shifts its focus from penalties for unauthorized infringement to penalties for access unauthorized by the rightsholder."136 This is a very different proposition. Does it benefit society to allow each rightsholder to define what constitutes permissible access and use of his or her work?

It also appears that there was scant attention paid to public policy and the impact on society when the DMCA was enacted. Copyright holders, especially those in the entertainment industry, carried the day. The resulting legislation is described by Professors Dan Burk and Julie Cohen who use the analogy of fencing public rights of way. If the real property analogy is carried out, then the public's rights of access should trump the private right to fence the property. This analogy tracks the 19th century fencing of private land, using what was new technology at the time—barbed wire. The use of barbed wire caused range wars, which resulted in new laws that penalized the cutting of legitimate fences which enclosed private property and the unauthorized fencing of public lands.137 Burk and Cohen carry the analogy further: the provisions of section 1201 should be considered responses to the threat of fence cutting. In other words, the use of technological controls to block access to public domain content embodied in a copyrighted work or to block fair uses of such content is the equivalent of unlawful fencing off of public land without concomitant guarantees that the public may continue to enjoy the easement or rights of way to content that copyright holders really have no right to lock up.138

136 Burk & Cohen, supra note 25, at 51.
137 Id. at 53 (citing ERNEST STAPLES OSGOOD, THE DAY OF THE CATTLEMAN 191-95 (1929)); see also SCOTT S. SMITH, The Wire that Won the West, AM. HERITAGE INVENTION & TECH, Fall 1998, at 34, 38-40.
138 Id. at 53-54.
One writer describes the goal of the DMCA as stopping individuals from breaching their contracts with the publishers and producers of copyrighted works through technological protections. This approach "tries to define a category of bad tools that are associated with allegedly harmful activity . . . and tries to go after the tools that facilitate the activity, rather than just the harmful activity." The statute prefers some technologies over others and may prove impossible because it "requires the law to draw a line between innocent tools and other tools that are harmful simply because they are used to facilitate harmful activity." Most tools have some legitimate noninfringing use, which under Sony would mean that the technology or tool would be noninfringing. It appears, however, that substantial noninfringing use is not sufficient to excuse some of the tools of circumvention when they have actually been used to circumvent technological protections implemented by a copyright holder.

Another general concern is what happens when a work to which technological controls have been applied is comprised to a large extent of public domain materials. Clearly, the rightsholder in such work does not have a copyright on the public domain material; nonetheless, that content is "locked up," and unprotectable material is also restricted from access. How much of the material has to be protected before it is "protected under this title?" Likely, as long as the entire compilation meets the requirements for copyright so that originality is found in the arrangement, selection of material, etc., it will qualify for copyright and therefore be a work "protected under this title." An additional question which has public policy implications is whether it should make a difference if such work is a work primarily intended for entertainment as opposed to a scholarly or research work.

One of the benefits of the web is that it may remove the need for a middleman such as producers and publishers. If writers and artists can make their works available directly on the web, there is little need for a traditional publisher. Moreover, many believe that "information wants to be free" since the majority of the public fails to respect copyright law and instead ignores it. But it is the

139 Kerr, supra note 135, at 167.
140 Id. at 167-68.
141 See Sony, 464 U.S. at 442.
142 Ginsburg, supra note 4, at 12.
144 The phrase is often attributed to Stewart Brand who said at a 1984 hacker's conference, "on the one hand, information wants to be expensive, because it is so valuable. The right information in the right place just changes your life. On the other hand, information wants to be free, because the cause of getting it out is getting lower and lower all the time." The statement was printed in a report/transcript from the conference in the WHOLE EARTH REV., May 1985 at 49. It quickly
middlemen who have lobbied Congress to "lock up" digital content, and under the DMCA, Congress chose to ban the tools of copying.\textsuperscript{145} If all copyright holders are so concerned about unrestrained distribution of their works, one might wonder why so much free content is available on the web. Clearly, the economic models which show that creators will create their works only if they are compensated is not absolutely true. Perhaps it is because of the origins of the Internet which was based on norms of sharing academic and scientific information. In academia and nonprofit scientific research, the reward is not remuneration but instead is reputational.\textsuperscript{146} Other content on the Internet not based on these norms, however, originally was made available on a subscription model; now it has become free. Examples include the\textit{New York Times} and the\textit{Wall Street Journal}.\textsuperscript{147} The amount of free material available on the web is astronomical and ranges from electronic books to art photographs and from new music to performance art. As organizations such as museums make their slide collections freely available online, the quality of the images that are currently available for free will increase. Additionally, more than 100,000 musicians have decided to provide free access to their songs using MP3.com,\textsuperscript{148} and the number is increasing. Much of the content is provided by public institutions such as colleges and universities and their faculties, but also by government agencies. A great deal of this free material on the web, however, has been put there by individuals.\textsuperscript{149}

Section 1201 does not even consider free content.\textsuperscript{150} Under the 1909 Copyright Act, it was easy to put something into the public domain; one simply published the work without meeting one of the statutory formalities, such as notice of copyright. Today, it is much more difficult and probably requires some affirmative act, if it can be done at all.\textsuperscript{151} The anti-circumvention provision assumes that the copyright holder will control access and is motivated only by economic concerns.

\begin{itemize}
  \item became a mainstay of the "Hacker Ethics." \textit{See} \url{http://www.it.rit.edu/~spg/ICSA411/GroupProj/Encrypt/slides/tsld010.htm}.
  \item \textsuperscript{145} Lastowka, \textit{supra} note 143, at 306-07.
  \item \textsuperscript{146} \textit{Id.} at 314-15.
  \item \textsuperscript{147} \textit{Id.} at 313. What remains to be seen is whether over time, some of the free access sites which currently make their money through accepting advertising, etc., eventually convert their free access to a pay-for-view system.
  \item \textsuperscript{148} \textit{Id.} at 319.
  \item \textsuperscript{149} \textit{Id.} at 320.
  \item \textsuperscript{150} \textit{Id.} at 321.
  \item \textsuperscript{151} One of the goals of the Creative Commons is to help copyright owners put their works in the public domain by making it clear what this requires or to put it into a shared resource much like the Nature Conservancy. \textit{See} \url{http://www.creativecommons.org}.
\end{itemize}
Further, not all circumvention will be done for nefarious purposes. Congressman Rick Boucher has stated that he believes that section 1201(a) should be amended so that it is restricted to instances where the purpose of the circumvention is to infringe copyright. This would mean that other circumvention activity would not trigger the criminal penalties of the Act whether for fair use or other "benign" purposes.\textsuperscript{152}

IV. IMPACT ON LIBRARIES AND LIBRARY USERS

What is it that libraries want? Libraries want to serve the needs of their users. They want to ensure that users have the same rights to use digital documents as they currently have to use analog documents. Patrons should have the right to read anonymously, to browse electronic documents, to place a hold on desired publications in use by someone else, and to check out (use) materials for a reasonable period of time. Additionally, they should have the right to make fair use copies of excerpts or entire works "at their discretion, guided by the dictates of their consciences."\textsuperscript{155} The idea of sharing copyrighted works both through libraries and users in their homes is embedded in the national culture. Because of the aggregate of the copying that might be done in libraries, they are "high profile sharers" and copyright holders watch them carefully to ensure that they stay within the law.\textsuperscript{154}

The Association of Research Libraries (ARL) has developed a statement called \textit{Fair Use in the Electronic Age: Serving the Public Interest} that was adopted in the mid-1990s.\textsuperscript{155} It specifies what members of the public have a right to do without infringing copyright:

(a) [T]o read, listen to, or view publicly marketed copyright material privately, on site or remotely; (b) [T]o browse through publicly marketed copyrighted material; (c) [T]o experiment with variations of copyrighted material for fair use purposes, while preserving the integrity of the original; (d) [T]o make or have made for them a first generation copy for personal use of an article or other small part of a publicly marketed copyrighted work or a work in a library's

\textsuperscript{152} See Boucher, \textit{supra} note 122, at 99.


\textsuperscript{154} Id. at 824-25.

collection for such purpose as study, scholarship, or research; and (e) to make transitory copies if ephemeral or incidental to a lawful use and if retained only temporarily.\textsuperscript{156}

This document posits that nonprofit libraries should be able to undertake certain activities on the part of their clientele without infringing copyright. Such activities would include preserving copyrighted materials by electronic means and providing copies through interlibrary loan. Moreover, libraries should not be liable for the actions of their users after they post the appropriate notices on unsupervised reproduction equipment.\textsuperscript{157}

In 1994, ARL adopted \textit{Intellectual Property: An Association of Research Libraries Statement of Principles}, a statement in response to the White Paper that affirms the rights and responsibilities of the research library community in copyright.\textsuperscript{158} The most important of these is that copyright exists for the public good and concomitantly that fair use must be preserved in the developing information infrastructure. Federal government works should remain free of copyright restrictions. The document also states that licensing agreements should not be allowed to abrogate either fair use or the library exemptions provided in the Copyright Act.\textsuperscript{159} At the same time, it recognized that librarians and educators have an obligation to educate the users about their rights and responsibilities under intellectual property laws.\textsuperscript{160}

By 1999 ARL restated some of these values in a document called its Keystone Principles,\textsuperscript{161} which is a slight change over earlier statements. For example, access to information is now identified as a public good.\textsuperscript{162} This is a recognition that information is often created by academic authors and institutions or public institutions. The public interest is served by having this information available.

\begin{itemize}
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} \textit{Id.}
\item \textsuperscript{159} \textit{Id.}
\item \textsuperscript{160} \textit{Id.}
\item \textsuperscript{161} \textit{See Association of Research Libraries, at http://www.arl.org/training/keystone.html (last modified Oct. 9, 2002).}
\item \textsuperscript{162} \textit{Id.} The other two principles are (a) the need for bias-free systems and for libraries to create these new systems and (b) to affirm the idea of the library as a nexus for learning and the sharing of knowledge. One could argue that access to information is seriously jeopardized by the anti-circumvention provision.
\end{itemize}
ARL believes that commercial enterprises have disrupted the public availability of such information through pricing policies, licensing items, and the like.  

Clearly, section 1201’s anti-circumvention provision is contrary to these goals and principles highlighted by library associations on behalf of libraries and the users of library materials. Some of the issues raised in the general critique section also apply to libraries and library users. Other issues are quite unique.

A. WHAT IF A USER CIRCUMVENTS?

Consider the situation of an academic library that acquires a digital work and pays for access for its users. The terms of access specify that an individual patron may access the work only one time within a thirty-day period. Suppose that a patron accesses the work in the library and makes use of the work, but in doing so manages to disable the limitation on repeated use as it applies to her. A good example would be an e-Book that has to be read on the Adobe E-Book Reader. In removing the control that restricts the number of uses per individual patron, the user has circumvented the access controls applied by the copyright holder. Under the terms of section 1201, certainly the individual is liable for the act of circumvention.

But is the library also liable? After all, it is through the library that the user was able to obtain initial access to the work, and it was through the library-accessible copy that the user disabled the control technology. In no way did the library benefit from the activities of the user, and yet, the library provided the entry point to the controlled copyrighted work. Consider the following situation: Assume that the work is software for which the library has acquired access, and the user is a scientist who engages in reverse engineering. Would the library incur liability for this act? Under the library exemptions found in section 108 of the Copyright Act, libraries are generally not responsible for the infringing acts of their patrons if the library satisfies the statutory conditions. For example, if the library provides unsupervised reproduction equipment, the library is required to post a notice on the equipment that alerts library users to the fact that works may be protected by copyright. Section 1201 contains no such requirement of notice or any language that would exempt a library from liability for the act of a library user who circumvents technological access controls on a work that the library makes available to the user. On the other hand, it is contrary to the spirit of the Copyright Act and the library exemptions to create strict liability for libraries based on the actions of their patrons for acts of circumvention.

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163 Id.
Should it make a difference if the patron were able to remove access controls entirely so that any subsequent user of the library's digital copy of the work no longer had any restrictions about the number of uses within thirty days? Is this more beneficial to the library? Perhaps so, if it means that the user community for one academic library has greater access to the particular digital work than do users at other academic libraries when both libraries paid the same fee for the access.

If the library does incur some liability, is it as a contributory infringer? Contributory infringement is defined as when one contributes to the direct infringement of another, but, before there can be contributory, there must be direct infringement. Contributory infringement requires that the secondary infringer either know or have reason to know of the direct infringement. Another frequent requirement for contributory infringement in copyright is material contribution to the direct infringement. It may also involve active inducement for direct infringement. If the library provides access to the work to which access controls have been applied by the copyright holder and a library user circumvents the technology, clearly there is direct infringement on the part of the user. Did the library provide the means for the act of circumvention?

Or is the library vicariously liable for the circumventing acts of its patrons? Vicarious liability evolved from the doctrine of respondeat superior which states that employers can be held strictly liable for torts committed by their employees within the course of their employment. Employers are viewed as having supervisory authority over employees and therefore an employee's acts are attributed to the employer.

Section 1204 does not mention liability for anything other than direct infringement, but neither does section 504, the regular damages provision of the Copyright Act, and yet courts have repeatedly found contributory and vicarious liability for copyright infringement. Further, section 1201(c)(2) states that "[n]othing in this section shall enlarge or diminish vicarious or contributory liability for copyright infringement in connection with any technology, product, service, device, component, or part thereof." Thus, a library could be contributorily and vicariously liable. Clearly, if it is a library employee who commits the act of circumvention within the scope of her employment, then the library would be vicariously liable. It is less likely to incur vicarious liability for acts of patrons even though a library could exercise some supervision over the use of digital materials by patrons.

167 Id. § 12.04[A][1].
Should courts determine that libraries may incur liability for circumvention acts of their patrons who are using library acquired digital works, what responsibility should the library have to supervise a patron’s use of the material to ensure that he does not circumvent the access controls? Such supervision certainly flies in the face of long-held principles that users of library materials should be able to use them in private. It is unthinkable that the law would impose a duty on behalf of libraries to look over the shoulder of their users to ensure that they are not violating section 1201. It is possible that to guard against liability, libraries might be forced to examine digital works when the patron has finished using them to ensure that access control mechanisms are still in place. Again, this would place a heavy burden on libraries.

B. CONTINUING ACCESS

Is there any way to ensure that works acquired by libraries to which technological access controls have been applied offer continuing access other than by negotiating licenses that so provide? For libraries, it is imperative that continuing access be provided with reasonable terms. This envisions the ability of a library to negotiate reasonable terms to ensure continuing access to works with circumvention controls. What constitutes reasonable continuing access for one library may not work for another library. For example, for library A, it may be essential that each individual user be able to access the protected digital work repeatedly for the purpose of scholarship and research. For library B, a single access per user may be adequate. While this could be managed through DRM, it might also be managed by technological controls. However, it is more likely to work best for libraries when there is a negotiated license for digital products. Libraries that need greater access should be willing to pay for this access.69 On the other hand, “[l]icensing reconfigures digital information as a service rather than a product, potentially subject to use restrictions or even reclamation, and seemingly immune to public policy considerations imbedded in copyright law, such as fair use and section 108 rights and privileges.”70 Moreover, licensing threatens to compromise a user’s access to libraries’ materials in ways not possible in the analog world.71

70 Bartow, supra note 153, at 828.
71 Id. at 829.
Clearly, if the continuing access fails, under the Librarian of Congress' rulemaking, the library could circumvent the controls to ensure proper operation. This would now be permitted under the Act.

C. BROWSING

How can browsing be preserved? Or is browsing a type of use that can be controlled technologically? Some argue that browsing through materials on the Internet is not the same as browsing in the analog world. One writer noted that "[b]rowsing through pages or images on the Internet is subjectively quite distinct from buying and owning a book or a record. . ." But is it different from going into a library which has acquired a copy of a work and makes it available for access by the public and for browsing?

Perhaps browsing is different when one is talking about the digital equivalent of turning pages of the content of the work. But what about an index or table of contents to the digital work? Should the index or contents page not be made available for browsing before one "enters the work"? On the other hand, it could be argued that searching the contents by keyword is actually using the work, as opposed to browsing in order to determine whether the work contains information that would be useful to the patron.

D. FAIR USE

How can fair use be preserved when the statute creates a cause of action for circumvention of technological controls that is separate from copyright infringement? The fair use exemption is a bedrock principle of American copyright law and libraries traditionally have provided access to materials either directly or through interlibrary loan that scholars and researchers use in order to exercise the fair use privilege.

With an appropriate fair use limitation, the access right under § 1201 becomes more than such a component. It becomes instead an Über-copyright law, rigid as to specified exceptions, and therefore freed of further inquiry into the balance of copyright owner rights and user privileges that the fair use doctrine—and the general structure of copyright law—require.

172 See supra note 96 and accompanying text.
173 Lastowka, supra note 143, at 299.
174 Ginsburg, supra note 4, at 17.
As librarians have repeatedly argued, how can one make fair use of a work unless access is obtained? If the initial access was lawful, then repeated access to make a fair use should be permitted. The problem with arguing for fair use in this context is that it may really be an argument for an exception for fair access. If the user is making a transformative use of a copyrighted work, this would qualify as a fair use if the work had no access controls applied to it. Once the work is encumbered with technological controls, it could be argued that the use should still be considered to be a fair use if it qualified for such absent access controls. Professor Jane Ginsburg argued that "[i]n theory, access controls are designed to protect a business model based on price discrimination according to intensity of use; they are not intended to prohibit scholarly or critical examination of the works themselves." Yet, if printed versions of works disappear and works are available only in digital format with access controls, the threat to fair use will not be speculative.

The call by librarians to permit circumvention once lawful initial access has been obtained may be increasingly necessary. For example, note the restrictions contained in the permissions on the E-Book version of Alice's Adventures in Wonderland, originally published in 1865, and thus long in the public domain. In fact, the text for the E-Book was obtained from Project Gutenberg. The restrictions contained in the work include no printing, no copying to the computer clipboard, no lending of the book to someone else, and most ludicrously, "[T]his book cannot be read aloud!"

E. LOCKING UP PUBLIC DOMAIN MATERIALS

The lifeblood of many publishers has been the repackaging and selling of public domain works. The question of whether section 1201 prevents the circumvention of technological controls applied to such works has not been clearly answered. The language of the statute in (a)(1) relates to materials that are protected under the Copyright Act, which naturally would exclude public domain materials. Some writers argue that it should be permissible to circumvent technological access controls applied to public domain works. This breaks down,

175 Id. at 16.
176 Id.
177 Id.
179 See infra note 190 and accompanying text.
however, when the work contains a mix of original and public domain materials.\(^{181}\)

As the federal government contracts out various studies and reports, it is possible that even these works will be copyrighted despite the fact that they are produced with public funds. The anti-circumvention provision, as applied to these works, is of particular concern since such publication may be available only in digital format to which access controls have been applied. In other words, the "single source" problem.

The concern about locking up public domain materials is gaining ground internationally as well. Unesco's draft recommendation on Multilingualism and Universal Access in Cyberspace contains the following statement:

Member States should work to ensure that the principle of fair use is not weakened through inappropriate use of technical means to restrict access or ensure security. In particular, Member States are encouraged in their national and international deliberations on intellectual property laws to ensure free access to public domain information (such as statistical, regulatory, environmental and safety-related information) which is essential for citizens in a modern democratic society.\(^{182}\)

Professor Jane C. Ginsburg expressed concern about technological measures that package public domain materials and other uncopyrightable material along with copyrighted content. This could be done by encrypting the entire work, and thus the public domain material would also be unavailable. She notes that such an outcome would be totally contrary to the intent of Congress. To avoid this result, she suggested that the following class of works might be exempted under section 1201(a)'s rulemaking provision:

Compilations and other works that consist of or incorporate works or materials in the public domain, unless the compilation or other work is marked in such a way as to identify the public domain components, thereby permitting the circumvention of any technological measure that controls access to the public domain components.\(^{183}\)

\(^{181}\) See Landau, supra note 169, at 302-03.

\(^{182}\) http://www.unesco.org/webworld/.

\(^{183}\) Letter from Jane C. Ginsburg, Copyright law professor, Columbia University School of Law, to David Carson, General Counsel, U.S. Copyright Office (June 11, 2000) (post-hearing comment on Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control

https://digitalcommons.law.uga.edu/jipl/vol10/iss2/6
F. THE DIGITAL DIVIDE

A pay-for-view world certainly has the potential to reduce or even eliminate digital piracy, but it would also extend the digital divide. Access to materials for the poor would be reduced. Libraries have traditionally ensured access for the disenfranchised, yet pay-for-view may change all of this.184

While libraries and entities that fund these libraries could provide sufficient funding so that access to pay-for-view materials is not problematic for any user, the reality in times of increasing information and decreasing library budgets means that universal access is unlikely to occur. Therefore, it is very likely that some individuals will be able to fund directly their own access to this pay-for-view material, but many others will have to rely on whatever access a library can provide. This may well mean that the availability of information to the poor and other disenfranchised individuals will decrease thus further dividing the world into those who can afford access and those who cannot.

G. EXEMPTIONS FOR DISTANCE EDUCATION

On November 2, 2002, the president signed the TEACH Act185 which amended Section 110(2) of the Copyright Act and provided a broader exemption for the performance and display of copyrighted works in the course of educational transmission.186 TEACH contains two provisions that refer to the anti-circumvention provision. For example, accredited nonprofit educational institutions may digitize analog works in the portions permitted by section 110(2) of the Act in order to use them for distance education via digital networks if the publisher has no digital version available. Institutions may also digitize analog works if the digital version that the publisher has available has technological controls that prevent its use for distance education by access controls or the like.187 The second provision regarding anti-circumvention in the TEACH Act places a requirement on the institution that is availing itself of the exemptions provided in the Act that it not interfere with technological measures used by the copyright holder to prevent retention and unauthorized dissemination.188

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184 See Foley, supra note 7, at 383-84.
186 For a detailed treatment of the TEACH Act, see Laura N. Gasaway, Distance Learning and Copyright: An Update, 49 J. COPYRIGHT SOC'Y U.S. 195 (2001).
188 TEACH Act § 13301.
Many publishers have developed models for libraries that require the purchase of unwanted items in order to acquire access to content that is desired. Several years ago journal publishers such as Elsevier mandated that libraries subscribe to the printed versions of their journals before electronic access to the same content would be permitted. This is a type of access control, although perhaps not a technological one. Today, publishers have developed other so-called “bundling” packages that require libraries to acquire a package of content as opposed to the titles of the works in which they are interested. These are protected by access controls in the form of passwords. Thus, a library’s only choice is to take the unwanted content in order to acquire needed access or fail to provide access at all. This causes budget as well as access concerns for libraries.

I. POTENTIAL FOR SUBSTITUTING FREE CONTENT

Libraries are already experiencing a trend on the part of users to substitute free content on the web in the place of expensive, access restricted content. Often, the content is the same, but the commercially published content may have important features that are not present in the free source. An example is legal information such as court reports, statues, etc., which have long been included in commercially produced databases. There are now other alternatives to the expensive commercial computer assisted legal research databases, LEXIS and Westlaw, and their restrictive license agreements. Many library users are relying on the free websites that also contain the same official court reports, statutes, etc. Despite the lack of special features offered by the commercial services, even some law firm users are relying on free material on the web in order to avoid the high fees charged by LEXIS and Westlaw. Further, new citation formats that have been proposed for citing online legal materials actually erase the difference between the commercial and free sources for this material. Members of the public are also increasingly turning to this free content.

A variety of online publishing efforts are putting free content on the web that can substitute for commercially produced works with access controls. Project Gutenberg is an excellent example. It is the oldest producer of free electronic books, which also includes music. There are now over 5000 eBooks available for viewing through a web browser or downloadable to a computer. Most eBooks are in plain text, but many are also in other formats including HTML. Further, there are also compressed (zipped) versions of most files available. The contents

are searchable by author, title, subject and language. Another such project is "ibiblio," a project of the University of North Carolina-Chapel Hill and the Center for the Public Domain which, bills itself as a "conservancy of freely available information, including software, music, literature, art, history, science, politics, and cultural studies." It is a collection of contributor-maintained collections on the web which uses the open source model to "encourage users to help shape the way information is managed and accessed in the 21st century." ibiblio is a collaborative project with several components identified as: (1) expanding and improving the distribution of open source software, (2) continuing the University of North Carolina's programs to develop an online library, (3) hosting and fostering projects that expand transparency and openness into new areas (4) creating, publishing and distributing research on open source communities, and (5) expanding and improving the creation and distribution of open source software. The success of ibiblio is reflected by the fact that it receives over three million information requests daily.

An important free source for free access to scientific articles is PubMed Central, which may be described as a "digital archive of life sciences journal literature" managed by the National Center for Biotechnology Information at the U.S. National Library of Medicine. It was established to provide barrier-free access to primary research reports in the life sciences. Additionally, it serves as a host for scientific publishers and organizations to archive, organize and distribute their research articles at no cost to the user. The archiving of this material will guarantee availability to researchers in the future. Copyright in the individual items remains with the publisher, author, or the society. Both peer-reviewed and nonpeer-reviewed reports and articles are accepted, but the contents are clearly marked to indicate the peer review status of an item. PubMed Central also has relationships with foreign learned societies and repositories. Any journal currently indexed by the major abstracting and indexing services is eligible for inclusion in PubMed Central along with those that have on their editorial boards at least three scientists who hold research grants from major funding agencies.

The Budapest Open Access Initiative (BOAI) has also attracted a good bit of attention. It arose from a 2001 meeting of the Open Society Institute. The aim of the gathering was to hasten the "progress in the international effort to make

192 Id.
193 Id.
194 See http://www.ibiblio.org/about.html.
196 See http://www.pubmedcentral.nih.gov/about/pubinfo.html.
research articles in all academic fields freely available on the Internet." 197 The result of the meeting was the BOAI, which represents statement of principle, strategy, and commitment. 198 Signatories to the BOAI include hundreds of individuals and organizations worldwide who represent "researchers, universities, laboratories, libraries, foundations, journals, publishers, learned societies, and kindred open-access initiatives." 199 The BOAI states that those works that "scholars give to the world without expectation of payment" should be freely accessible online without cost to the user. 200 The BOAI recognizes that scholarly authors have rights and concerns about open access. 201 It suggests that the only constraint on reproduction and distribution of these scholarly works should be author control over the right to be properly acknowledged and cited. 202 A January 2002 BOAI press release contained the following statement:

An old tradition and a new technology have converged to make possible an unprecedented public good. The old tradition is the willingness of scientists and scholars to publish the fruits of their research in scholarly journals without payment, for the sake of inquiry and knowledge. The new technology is the internet. The public good they make possible is the world-wide electronic distribution of the peer-reviewed journal literature and completely free and unrestricted access to it by all scientists, scholars, teachers, students, and other curious minds. Removing access barriers to this literature will accelerate research, enrich education, share the learning of the rich with the poor and the poor with the rich, make this literature as useful as it can be, and lay the foundation for uniting humanity in a common intellectual conversation and quest for knowledge. 203

The Creative Commons is an entity that assists authors and others either to put works into the public domain or make them widely available through licensing. It is a nonprofit organization that is working to develop alternatives to the type of "grab" of rights that many commercial publishers and producers have claimed. The idea is to establish some alternative approaches to licensing that will

198 Id.
199 Id.
201 Id.
202 Id.
produce income for the copyright holder but will encourage contributions to the public domain. The assumption is that there are many creators who will welcome the exposure and benefits they will gain from putting their works in the public domain. The Creative Commons has recently developed prototype or "custom licenses" as online forms or templates, which can be filled out by creators without the assistance of an attorney. Available at no cost, creators will be able to select from a variety of license terms to ensure retention of copyright for the creator, but which might grant broad rights to the public to reproduce, display, distribute, etc. Other terms might include requiring proper credit for using the work, not permitting derivative works, and the like.

There are other free license projects such as Open Audio and Free Art Licenses. The Electronic Freedom Foundation (EFF) recognized that the sharing of information and works on the web benefited both the creators of these works and the public generally. EFF benefits creators by enabling them to build on others' ideas. Based on the open source software initiative, the Open Audio License provides the same type of freedom and access to music; therefore, "[i]t allows artists to grant the public permission to copy, distribute, adapt, and publicly perform their works royalty-free as long as credit is given to the creator as the Original Author." The purpose is to foster collaboration so that artists can build on each other's works. It benefits the public because it makes available to them new music and permits them to connect directly with artists as well as encourages the distribution of music. This will add value to the musician's reputation.

The Free Art License was developed by a French group that permits users to use works of art freely while still respecting the rights and interests of the original artist. According to the website, the license does not ignore author's rights but instead reformulates them to make it possible for the public to use creative works of art. Current copyright law restricts public access to works of art; the goal of the Free Art License is to encourage such access. The license has several goals: to make works of art accessible, to authorize use by the greatest number of people, to use the work in order to increase its use, to establish new conditions for creation, and to respect original artists and defend their moral rights. The license encourages the continuation of experimentation that many contemporary artists undertake. The website states that "[t]his is the basic aim of this Free Art..."
License: to promote and protect artistic practice freed from the rules of the market economy.\textsuperscript{208}

It is important that creators and users have these alternatives. Access controls are likely to cause users to seek free content in even greater numbers. Thus, publisher behavior in locking up content may actually drive users to use alternate sources even when those sources lack some of the special features that the technologically controlled digital works possess.

V. CONCLUSION

Certainly, the DMCA's anti-circumvention provisions has significant problems, not the least of which is the fact that each type of technological control has been compromised, and often fairly easily.\textsuperscript{209} Not only this, but the history of this country has an excellent example of attempts to lock up a product that the public wanted, and those attempts failed miserably. The 1919 18th Amendment to the U.S. Constitution made it illegal to be engaged in the manufacture, sale or transportation of alcoholic beverages, and yet many who lived through those years claim that alcohol flowed more freely than ever before. More prohibition did not stamp out the speakeasy and illegal stills, nor solve the problem; in fact, it may have even increased their numbers. The public did not accept prohibition, and it was repealed with the 21st Amendment in 1933. Further, prohibition increased the span and control of organized crime in this country. Should the country not have learned from this experience that prohibiting conduct that the majority of the public approves simply does not work?

Some writers complain that the provisions which prohibit the sharing of the means of circumvention is dangerously close to restraints of speech. Also, it is only within the entertainment industry that access controls enjoy popularity. Many users of digital works feel somewhat cheated because of the promise that if anti-circumvention legislation were provided, publishers and producers would rush to make digital content available. The popularity of Napster indicates that this simply has not occurred. The move to lock up content on the Internet overlooks a central factor: the very reason that the Internet enjoys such popularity is because so much material is available and access to that material is free.\textsuperscript{210} One writer noted that "[f]ree access content has been the driving force behind the popularity of the Web."\textsuperscript{211} Yet, section 1201 does not envision artists, musicians, photographers and other creators of copyrighted works making their

\textsuperscript{208} See http://artlibre.org/licence.php/lalgb.html.
\textsuperscript{209} See Lastowka, \textit{supra} note 143, at 310.
\textsuperscript{210} \textit{Id.} at 310-11.
\textsuperscript{211} \textit{Id.} at 312.
works available to the public for free. Certainly, publishers and producers should be free to protect their content on the Internet, but there should be no assumption that those who want to distribute their works for free should be prohibited from doing so. It can be argued that free access is a public good, and the law should be amended to reflect an interest in free access as well as in access controls.212

Content providers promised that a wealth of new digital products would follow the enactment of the anti-circumvention provisions, but this has not occurred.213 One might ask why. Is it because technological protections do not give adequate assurance that digital works cannot be copied? Or is it because access controlled works are simply not acceptable to the public?

The problems that access controls will cause to libraries and to the users of library materials are myriad. Libraries that acquire access for their users to works with technological access controls will face difficult management issues, especially for users who need remote access. For example, how can it be made clear to users what the access controls mean? How can such controls be managed? Will libraries have to create internal databases just to manage such works since the access controls are unlikely to all be the same? There are current problems with managing passwords and authenticating users for access even to licensed works when the restriction is by IP address. Many of these problems will carry over to managing access controlled by technological means beyond passwords. Does the management of these works mean that libraries will have to maintain the same level of control that publishers impose in order to avoid liability? What happens if there are mistakes? What liability will the library incur?

The traditional rights under copyright have not contained an access right. Perhaps it really boils down to "acceptable public use of materials."214 Thomas Heide argues that "[i]f the concept of the public access library is worth preserving it would be good to revise our copyright law to reflect this belief."215 There is also a concern about whether the anti-circumvention provision conflicts not only with basic copyright principles but with the copyright law itself. Professor Ray Patterson states that the ultimate irony is not that the DMCA conflicts with the Copyright Clause of the Constitution, but instead that it violates section 102(b) of the Copyright Act. Section 102(b) denies copyright protection to any "procedure, processes, system, or method of operation." Is not the anti-circumvention provision exactly procedures, process, systems and methods of

212 Id. at 320-21.
214 Heide, supra note 19, at 364.
215 Id. at 331.
operation? Moreover, "[c]opyright is not intended to regulate the market for electronic locks."" It is important for the legal system to adjust to new technologies and new markets; it should do so, however, without destroying the fundamental principles of copyright law. The law should give incentives to authors and creators so that they continue to produce copyrighted works, which may mean giving them reasonable control over the work. At the same time, the public's interests must be balanced, especially the interest in research and education, but also access to information. Publishers and producers have successfully convinced Congress that access controls on digital works must be protected, even to the extent of criminalizing the act of circumvention to make a fair use of the underlying copyrighted work. The question of whether society wants an access right on behalf of copyright holders is ultimately a political rather than a legal argument, but the Copyright Clause should be considered and the goal of learning promoted. In the words of Professor Patterson and Lindberg, "[t]here is a vital link between liberty and learning. Preserving the integrity of copyright law—including its law of users' rights—is critical to our free society."

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217 Posting of Dennis S. Karjala, to Cyberfraud listserv (Dec. 10, 2002).
219 See Hoeren, supra note 17, at 355.
220 Patterson & Lindberg, supra note 12, at 241.