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Falling On Deaf Ears: Is the "Fail-Safe" Triennial Exemption Provision in the Digital Millennium Copyright Act Effective in Protecting Fair Use?

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FALLING ON DEAF EARS: IS THE "FAIL-SAFE" TRIENNIAL EXEMPTION PROVISION IN THE DIGITAL MILLENNIUM COPYRIGHT ACT EFFECTIVE IN PROTECTING FAIR USE?

Woodrow Neal Hartzog*

If you cannot protect what you own, you don't own anything.
—Jack Valenti, President of the Motion Picture Association of America, 2002

Freedom has to be won, and, more importantly, the consequences of freedom have to be lived. You do not win freedom of information by filching data from a corporate warehouse, or begging the authorities to kindly abandon their monopolies, copyrights and patents. You have to create that freedom by a deliberate act of will, think it up, assemble it, sacrifice for it, make it free to others who have a similar will to live that freedom.

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I. INTRODUCTION

In order to "promote the Progress of Science and useful Arts," copyright law has, since its constitutional creation, existed in a reciprocal tension between the expansion and limitation of an author's exclusive rights. This reciprocity serves as the mechanism used to try to effectuate the appropriate balance between incentives for authors to create and the right of the public to freely use those creations. However, like a foreign species introduced into a stable ecosystem, technology serves as the foil to this balance and ensures that U.S. copyright law must be updated and adapted in order to fulfill its constitutional purpose.

On October 28, 1998, the Digital Millennium Copyright Act (DMCA) was signed into law, ushering in the most "sweeping revisions ever to the Copyright Act of 1976." The impetus underlying its enactment was "to bring U.S. copyright law 'squarely into the digital age.' As part of the ceaseless struggle to keep up with constantly evolving technology, this law proposes to 'make digital networks safe places to disseminate and exploit copyrighted materials.' The most important provision of the DMCA attempts to mandate respect for digital rights management (DRM) by instituting anticircumvention provisions into U.S.

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1 "[The 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." U.S. CONST. art. I, § 8, cl. 8.


3 Id. at 680-81 (quoting S. REP. No. 105-190, at 2 (1998)).

4 [DRM] systems restrict the use of digital files in order to protect the interests of copyright holders. DRM technologies can control file access (number of views, length of views), altering, sharing, copying, printing, and saving. These technologies may be contained within the operating system, program software, or in the actual hardware of a device.


copyright law—in effect, a ban on the act of circumventing or trafficking in devices that circumvent certain DRM systems.6

Congress recognized that although the DMCA provides the ability for authors to protect their works from infringing use, it was “appropriate to modify the flat prohibition against the circumvention of effective technological measures that control access to copyrighted materials, in order to ensure that access for lawful purposes is not unjustifiably diminished.”7 As such, Congress included in the DMCA an exemption from the ban on circumventing technologies that control access to works.8

Codified in section 1201(a)(1)(B)-(E), this exemption was enacted “[i]n order to ensure that the public will have continued ability to engage in noninfringing uses of copyrighted works, such as fair use.”9 This exemption, considered a “fail-safe” mechanism for offsetting the adverse effects of section 1201, is implemented through a triennial rulemaking proceeding conducted by the Register of Copyrights. The Register exempts users of particular classes of works if such persons are (or in the next three years are likely to be) “adversely affected by the prohibition . . . in their ability to make noninfringing uses . . . of [that] class of copyrighted works.”10 On October 27, 2003, after accepting comments from the

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8 17 U.S.C. § 1201(a)(1) “applies when a person who is not authorized by the copyright owner to gain access to a work does so by circumventing a technological measure . . . .” Copyright Office Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 67 Fed. Reg. at 63,579. The exemption was intended to “monitor developments in the marketplace for copyrighted materials, and allow the enforceability of the prohibition against the act of circumvention to be selectively waived, for limited time periods, if necessary to prevent a diminution in the availability to individual users of a particular category of copyrighted materials.” H.R. REP. NO. 105-551, pt. 2, at 36.


10 17 U.S.C. § 1201(a)(1)(C). “Given the threat of a diminution of otherwise lawful access to works and information . . . a ‘fail-safe’ mechanism is required.” H.R. REP. NO. 105-551, pt. 2, at 36. As part of the rulemaking proceeding, identification of the particular class of works to be exempted is made by the Register of Copyright “who is to provide notice of the rulemaking, seek comments from the public, consult with the Assistant Secretary for Communications and Information of the Department of Commerce, and recommend final regulations to the Librarian of Congress.”
public and holding several hearings on the matter, the Registrar of Copyrights issued her Recommendations for the triennial section 1201 exemptions.  

The "fail-safe" triennial exemption provision of the DMCA has drawn both high praise and scathing criticism. This Article examines whether the provision is effective for its intended purpose: to serve as a countermeasure to the DMCA's anticircumvention procedure by protecting the ability of the public to engage in noninfringing uses of copyrighted works, such as fair use.

Ultimately, this Article concludes that there are too many faults in both the structure and the execution of the rulemaking provision to meaningfully counteract the adverse effects of the anticircumvention provisions of the DMCA. Specifically, the rulemaking procedure explicitly refuses to consider granting an exemption to a class based on the use of the work—a rejection of principles that compose fair use which one of the very doctrines the exemption provision was supposed to protect.

Part II of this Article provides a general overview of copyright law, fair use, and the details of the DMCA. Part III details fully the DMCA's triennial exemption provision, providing the history for, and impetus behind, its inception, a review of the rulemaking process, and the past and present exemptions granted by the Librarian of Congress. Finally, Part IV considers whether the exemption provision is effective in preserving "Congress' commitment to fair use" and the public's ability to make noninfringing uses of copyrighted works. It will consider the inherent problems with the procedure, the issues reflected by the public's comments and replies, and the treatment of the provision by the Librarian of Congress. Ultimately, this Article concludes that although the provision purportedly serves as a counterweight to the anticircumvention laws, in reality it is barely more than a placebo mechanism that does very little to effectuate fair use in our digital society.

II. DIGITAL TECHNOLOGY, FAIR USE, AND THE ENACTMENT OF THE DMCA

A. FAIR USE

The U.S. Constitution provides that "Congress shall have Power To promote the Progress of Science and useful Arts, by securing for limited Times to Authors

12 Nimmer, supra note 2.
13 Letter From Marybeth Peters to James H. Billington, supra note 11, at 4.
and Inventors the exclusive Right to their respective Writings and Discoveries."\(^{14}\)

The granting of these "limited monopolies" serves as incentive for authors to create, and the expiration of these monopolies serves to benefit the public by allowing them free use of the work upon expiration. "To this end, copyright [law] assures authors the right in their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."\(^{15}\)

One of the most essential concepts in this balancing act is fair use. "When appropriate, fair use is an affirmative defense to an infringement claim, relieving the party from obtaining permission from the copyright holder and the obligation to pay a royalty or damages."\(^{16}\) In other words, copyright law recognizes that certain uses of copyrighted works that ordinarily would constitute infringement are justified under public policy, justice, and fairness, or are simply too innocuous to warrant a valid defense to any claim of infringement.

Ultimately codified in section 107 of the Copyright Act, the concept of fair use has played a critical role in ensuring that the incentives given to the author to create do not overpower the public's interest in making use of those works. Lord Mansfield's analysis of this tension illustrates the public policy that came to be reflected in the U.S. Constitution:\(^{17}\)

> [W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward for their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.\(^{18}\)

"Following the dictates of the Intellectual Property Clause, copyrights are limited in time. Moreover, in order for the social progress identified in the Constitution to take place, the public must have access to the work created. One

\(^{14}\) U.S. CONST. art. I, § 8, cl. 8.

\(^{15}\) Feist Publ'n, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50, 18 U.S.P.Q.2d (BNA) 1275, 1279 (1991); see also Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 419 n.10 220 U.S.P.Q. 665 (1984) ("The enactment of copyright legislation . . . is not based upon any natural right that the author has in his writings, . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted . . . .") (quoting H.R. REP. NO. 60-2222, at 7 (1909)).

\(^{16}\) Jeff Sharp, Coming Soon to Pay-Per-View: How the Digital Millennium Copyright Act Enables Digital Content Owners to Circumvent Educational Fair Use, 40 AM. BUS. L.J. 1, 6-7 (2002).

\(^{17}\) Id. at 5.

cannot build upon the unknown.”19 From as early as the nineteenth century, courts were mindful of the need for the public to use an author’s copyrighted work without his permission. In 1841, in the case of Folsom v. Marsh,20 Supreme Court Justice Story “formulated a set of principles that would serve as the foundation for what we now call fair use.”21

Justice Story determined: “In short, we must often . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work.”22 These guidelines proved to be the cornerstone for the development of the fair use doctrine in the United States.

Over the following two centuries, fair use was developed and codified, thereby providing greater guidance in determining whether a particular use of a copyrighted work should be protected. Section 107, the fair use provision of the Copyright Act, states:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.23

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20 9 F. Cas. 342 (C.C.D. Mass. 1841)(No. 4,901).
22 Folsom, 9 F. Cas. at 348.
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It is important to note that section 107 represents only guidelines for what should be considered fair use; it is by no means an exhaustive list. Additionally, the legislative history of section 107 explicitly states that "the doctrine must continue to live beyond technological changes. In other words, fair use is technology neutral. The limits imposed by fair use make the method of copyright irrelevant. Conversely, copying beyond the limits of fair use constitutes infringement without regard to the technology involved."24

Although fair use has, and will continue to be, a somewhat amorphous concept, it has proven to be invaluable in maintaining the balance and furthering the policy of copyright law. Fair use has proven especially important in the modern digital age, which has enabled the public to make more substantial and efficient use of copyrighted works. Although no court has yet to indisputably find that fair use is a constitutional requirement, it is impossible to see how the goals of copyright law could be furthered without the fair use doctrine.25

Consider the critical and paramount importance of fair use in the wake of digital rights management systems and the DMCA. The proper scope and application of a doctrine that validates unauthorized use within a scheme that prohibits unauthorized use is perhaps one of the most controversial topics in modern copyright law.26 It is appropriate to briefly explore the background of the DMCA in order to understand the conflict that has ignited such passion.


Although the Corley court did not necessarily agree that fair use was constitutionally required, the Supreme Court's intervening decision in Eldred v. Ashcroft, 537 U.S. 186, 123 S. Ct. 769 (2003) suggests that it is. See Eldred, 123 S. Ct. at 788-89 (describing fair use as a "built-in First Amendment accommodation"] and a "traditional First Amendment safeguard")."

Whether fair use is a constitutional requirement is beyond the scope of this Article. For more information, see Stephen M. McJohn, Tradition, The Copyright Clause, and the Constitutionalization of Fair Use, 10 MICH. TELECOMM. & TECH. L. REV. 95 (2003).

20 See generally Nimmer, supra note 2.
B. THE DIGITAL MILLENNIUM COPYRIGHT ACT

1. Development of the DMCA. The importance of digital technology can be summed up in four words: quality, quantity, selectivity, and expediency. Before digital technology, the word “copies” held a somewhat different connotation. With the exception of very few devices, copies were often inferior to the original, especially if they were second or third generation copies. Digital technology, however, allows a user to make a near-perfect copy of the original that is, for all practical purposes, indistinguishable from the original.

Traditional books, compact discs, VHS tapes, and other non-digital mediums also took up space. Now, a user can store numerous libraries of information on a digital medium the size of her hand. Furthermore, before digital technology, searching for a desired work could be a laborious process, involving a search of libraries, archives, retail stores, and other scattered sources. Now, a user can access nearly any work she desires from the comfort of her home, filtering the information in nearly any way she desires.27

Finally, a user can accomplish all of these tasks in seconds. What took a copy machine fifteen minutes now takes a computer a millisecond. Thanks to the interconnectivity of the Internet, users can now exchange these works. However, perhaps the most substantial change the digital revolution has brought about is that, in many instances, a user can do all of this for free.

Enter Congress. “Historically, Congress has achieved the objective of the Constitution’s Copyright Clause ‘by regulating the use of information—not the devices or means by which the information is delivered or used by information consumers—and by ensuring an appropriate balance between the interests of copyright owners and information users.’”28 Indeed, the Copyright Act is largely “technology neutral,” in the sense that, by and large, it does not “regulate commerce in information technology, i.e., products and devices for transmitting, storing and using information. Instead, [it] prohibit[s] certain actions and create[s]

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27 One scholar has noted:

The promise of digital technology rests in its capacity to bring enormous quantities and varieties of data, images, sounds and texts to users empowered to filter the information for the content they desire. News information from throughout the world is now delivered to personal computer screens in real-time. Recorded entertainment is placed on media that has more than twice the storage capacity of its predecessor, produces superior playback quality, and has a longer archival life.


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exceptions: to permit certain conduct deemed to be in the greater public interest . . ." 29

However, Congress saw that the advent of digital technology necessitated a new approach to copyright legislation. In the debate over what would eventually become the DMCA, the Commerce Committee stated:

[T]he digital environment poses a unique threat to the rights of copyright owners, and as such, necessitates protection against devices that undermine copyright interests. In contrast to the analog experience, digital technology enables pirates to reproduce and distribute perfect copies of works at virtually no cost at all to the pirate. As technology advances, so must our laws. 30

As such, Congress incorporated anti-circumvention structures into the WIPO Treaties Act, which would compel the DMCA. 31 "Those structures target not only bad acts (the activity of copying itself), but also bad machines (devices that facilitate copying) and bad services (conduct that enables copying). In this manner, copyright law expands its reach." 32

2. The Anticircumvention Provisions. Codified in section 1201, the DMCA creates three distinct types of anticircumvention violations with civil and criminal penalties: a basic provision banning circumvention of measures that control access to a work, and two different bans on trafficking devices or systems designed for circumvention. 33 The first trafficking ban makes it illegal to traffic in technology primarily designed to circumvent devices that control access to copyrighted works, and the second makes it illegal to traffic in technology primarily designed to circumvent devices that control the copying of copyrighted works. 34

Of primary concern to this Article is the basic ban on circumvention of technology that controls access to a work. 35 According to the statute, this ban dictates that one cannot "avoid, bypass, remove, deactivate, or impair a technological measure" that "requires the application of information, or a process or a treatment . . . to gain access to the work." 36 As two scholars noted, "[I]n

29 Id.
31 See Nimmer, supra note 2, at 684.
32 Id.
35 Section 1201(a)(1)(A) states that "[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title."
36 Id.
practice, this means that one cannot decode or decrypt a copyrighted work in order to gain access to it.37

The basic ban on "access" circumvention is the only provision of the three anticircumvention provisions that is subject to the triennial exemptions promulgated by the Librarian of Congress.38 However, much of the debate surrounding this issue centers on whether the two trafficking bans should also be included in the exemption provision.39

The bans on trafficking attempt to prohibit users from manufacturing, importing, offering to the public, or otherwise trafficking in any technology or service that is primarily designed or produced for the purpose of circumventing a technological measure that controls either (1) access to a copyrighted work40 or (2) the rights of a copyright owner (i.e., the ability to copy a copyrighted work).41

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37 Taylor & Andelman, supra note 25, at 106.
39 Nimmer, supra note 2, at 737. "The reach of the trafficking ban is unjustifiably broad; Congress should have reconciled the trafficking ban with the exemptions that it placed on the basic provision."
40 Section 1201(a)(2) states:
   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.
41 Section 1201(b) states:
   No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—
   (A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; (B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.
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It should be noted that while the basic ban on access circumvention has a corollary trafficking ban, the only ban that exists relating to technologies that protect an author’s rights (by controlling the ability to copy works) is the trafficking prohibition. This means that it is not a violation of the DMCA to directly circumvent a technological measure that prevents the copying of a copyrighted work (a technology that protects the rights afforded to a copyright owner). This exclusion was a deliberate attempt by Congress to preserve fair use.

Professor David Nimmer offers a helpful explanation on the true effect of the statute:

As to prohibited access, the person engaging in that conduct has violated the basic provision; anyone assisting her through publicly offering services, products, devices, etc., to achieve the prohibited technological breach is separately culpable under the ban on trafficking. By contrast, a person who engages in prohibited usage of a work to which he has lawful access does not fall afoul of any provision of section 1201. It is only someone who assists him through publicly offering services, products, devices, etc., to achieve the prohibited technological breach who becomes culpable under the additional violations.

Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64,556, 64,558 (Oct. 27, 2000) (codified at 37 C.F.R. pr. 201). Moreover, in United States v. Elkom, Ltd., 203 F. Supp. 2d 1111, 1120-21, 62 U.S.P.Q.2d 1736 (N.D. Cal. 2002), Judge Whyte stated: (“The decision not to prohibit the conduct of circumventing copy controls was made, in part, because it would penalize some noninfringing conduct such as fair use.”). In fact, Congress expressly disclaimed any intent to impair any person’s rights of fair use: “Nothing in this section shall affect rights, remedies, or defenses to copyright infringement, including fair use, under this title ...” 17 U.S.C. § 1201(c)(1). Thus, circumventing use restrictions is not unlawful, but in order to protect the rights of copyright owners while maintaining fair use, Congress banned trafficking in devices that are primarily designed for the purpose of circumventing any technological measure that “effectively protects a right of a copyright owner,” or that have limited commercially significant purposes other than circumventing use restrictions, or that are marketed for use in circumventing the use restrictions.

Id. at 1120-21.

Nimmer, supra note 2, at 689-90.
Along with these new provisions enabling copyright owners to protect their work came the potential for abuse—an issue not lost on Congress during the drafting of the DMCA.


According to the House Judiciary committee, the ban on circumvention of access technologies "was intended to impose absolute liability against those who lack authorized access. It was only when the subject access was authorized that 'the traditional defenses to copyright infringement, including fair use, would be fully applicable.'"44 In other words, "fair use would apply only following lawful access, not as a basis for obtaining such access in the first instance."45

Indeed, it is important to note that the DMCA explicitly leaves fair use untouched, and technology neutral.46 Instead of allowing a fair use defense against a charge of an anti-circumvention violation, "vindication of user interest comes directly in section 1201 itself and in other aspects of the Digital Millennium Copyright Act. In other words, there is no such thing as a section 107 fair use defense to a charge of a section 1201 violation; rather, section 1201 itself includes provisions designed to aid the interests of users[,]" such as an exemption for certain classes of works.47

III. THE DMCA'S TRIENNIAL "FAIL-SAFE" EXEMPTION PROVISION

Congress was aware that the anti-circumvention provisions created the potential for "less access, rather than more, to copyrighted materials that are important to education, scholarship, and other socially vital endeavors."48 Myriad situations could potentially decrease the public's access to works, such as the disappearance of hard copies, encryption devices and other DRM systems that remain infinitely active; new business models that focus on restricted distribution and availability; or other unknown factors.49 As such, Congress found that it was "appropriate to modify the flat prohibition against the circumvention of effective

44 Id. at 716.
45 Id. (citing H.R. REP. NO. 105-551, pt. 1, at 18 "[A]n individual would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of a work which he or she has acquired lawfully").
46 Section 1201(c)(1) states that "[n]othing in this section shall affect rights, remedies, limitations or defenses to copyright infringement, including fair use, under this title." Congress "determined that no change to section 107 was required because section 107, as written, is technologically neutral, and therefore, the fair use doctrine is fully applicable in the digital world as in the analog world." S. REP. NO. 105-190, at 23-24 (1998).
47 Nimmer, supra note 2, at 723 (emphasis added). For more information about the interplay between fair use and the anti-circumvention provisions of the DMCA, see id. at Part III.A.4.
technological measures that control access to copyrighted materials, in order to ensure that access for lawful purposes is not unjustifiably diminished.\textsuperscript{50}

A. PURPOSE OF THE PROCESS

Spurred by the potential for harm arising from the anticircumvention provisions, Congress created an exemption to the basic ban on circumvention of access technology which, according to Congress, serves to monitor the marketplace for copyrighted materials and grant an exemption to the ban on access circumvention for a limited time if it is necessary to prevent a decrease in the availability to users of a particular category of copyrighted materials.\textsuperscript{51}

Generally,

\[\text{the purpose of [the exemption] rulemaking proceeding is to determine whether there are particular classes of works as to which users are, or are likely to be, adversely affected in their ability to make noninfringing uses due to the prohibition on circumvention. If there are, the Librarian [of Congress] may exempt such classes from the statutory prohibition.}\textsuperscript{52}\]

More specifically, the provision codified in section 1201(a)(1)(B)-(E), was enacted to “ensure that the public will have continued ability to engage in noninfringing uses of copyrighted works, such as fair use”\textsuperscript{53} by providing that the prohibition against circumvention shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding three-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under [the Copyright Act].\textsuperscript{54}

In other words, the Librarian of Congress will promulgate new exemptions every three years to users of a particular class of works which, in his judgment, the
access anticircumvention provision harm, in terms of their ability to use copyrighted works.

B. THE MECHANICS OF THE EXEMPTION PROVISION

It should be reiterated that the focus of the rulemaking process is limited to section 1201(a)(1), which bans circumvention of technologies that control access to copyrighted works. "The Librarian [of Congress] has no authority to limit either of the anti-trafficking provisions contained in subsections 1201(a)(2) or 1201(b)."

The exemption provisions begin in subsection 1201(a)(1)(B), which states that the access anticircumvention provision will not apply to persons who are users of a "particular class of works." The term "particular class of works" is intentionally left undefined. The term is to be identified in a rulemaking proceeding conducted by the Register of Copyrights, who is to provide notice of the rulemaking, seek comments from the public, consult with the Assistant Secretary for Communications and Information of the Department of Commerce, and recommend final regulations to the Librarian of Congress. This provision is the source of great debate and will be covered in depth later in this article.

An important characteristic of the exemption provision is that neither an exception from liability, nor the whole rulemaking procedure can be used as a defense for any purpose other than relief from liability under section 1201(a)(1)(A). Professor Nimmer explains this concept, stating:

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55 Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection System for Access Control Technologies, 67 Fed. Reg. 63578, 63579 (Oct. 15, 2002) (codified at 37 C.F.R. pt. 201) ("In this triennial rulemaking proceeding, effects on noninfringing uses that are unrelated to section 1201(a)(1)(A) may not be considered.").

56 This entire portion of section 1201(a)(1)(B) reads:

The prohibition contained in subparagraph (A) shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title, as determined under subparagraph (C).


58 17 U.S.C. § 1201(a)(1)(E). "Neither the exception under subparagraph (B) from the applicability of the prohibition contained in subparagraph (A), nor any determination made in a rulemaking conducted under subparagraph (C), may be used as a defense in any action to enforce any provision of this title other than this paragraph."
a defendant whose usage wins exemption in pertinent rulemaking does not thereby gain any mileage in urging a fair use defense to copyright infringement, as opposed to a defense to the instant charge of violating the basic provision of section 1201. Likewise, a defendant who convinces the court that he falls within the exemption, even though not listed in the Librarian's published rules, should not be heard to make headway in any other feature of U.S. copyright law.\(^5^9\)

As such, the defense seems to be one of a "paracopyright" nature, i.e., a defense that, notwithstanding the effects it has on substantive copyright law, intentionally separates itself from traditional copyright doctrines such as fair use and the first sale doctrine.\(^6^0\)

1. **Evaluation Periods.** Upon the enactment of the DMCA, the statute provided for a two-year delay before the first exemptions were to be promulgated by the Librarian of Congress. The main purpose for this delay was "to allow the development of a sufficient record as to how the implementation of [DRM technologies] is affecting availability of works in the marketplace for lawful uses."\(^6^1\)

At the end of the two-year period between 1998 (the year of enactment of the DMCA) and 2000 (the expiration of the two-year delay), the Librarian of Congress made an initial determination as to classes of works to be exempted from the prohibition for the first triennial period.\(^6^2\) This determination was made upon the recommendation of the Register of Copyrights following an extensive rulemaking proceeding.\(^6^3\)

The exemptions promulgated by the Librarian in the first rulemaking remained in effect until October 28, 2003.\(^6^4\) At that point, the exemptions created in the first anticircumvention rulemaking expired, and the exemptions recommended by the Librarian of Congress for the second rulemaking session took effect for a new three-year period. The exemptions from the second rulemaking session will expire on October 27, 2006, and the rulemaking process will continue with a new set of exemptions from the third rulemaking session, and so on.\(^6^5\)

\(^5^9\) Nimmer, supra note 2, at 698-99.

\(^6^0\) Id. at 686 n.66, 699 n.132. This provision is consistent with Congress's overall intention to leave traditional copyright doctrines, such as fair use, unchanged with the passage of the DMCA.

\(^6^1\) H.R. REP. No. 105-551, pt. 2, at 37.

\(^6^2\) For more information, see infra Part III.C.1.


\(^6^4\) Id.

\(^6^5\) Id. For more information, see infra Part III.C.
It is during this three-year window that the Library of Congress and the Registrar of Copyrights embark on the rulemaking procedure by attempting to gauge the adverse effects of section 1201(a)(1)(A) by soliciting comments and replies to those comments, holding hearings, and conferring with the Assistant Secretary for Communications and Information of the Department of Commerce.

2. Responsibilities of the Register of Copyrights and the Librarian of Congress. The primary responsibility of the Register of Copyrights and the Librarian of Congress is to determine "whether users of particular classes of copyrighted works are, or in the next three years are likely to be, adversely affected by the prohibition in their ability to make noninfringing uses of copyrighted works.... In other words, the Register and the Librarian must "to assess whether the implementation of access control measures is diminishing the ability of individuals to use copyrighted works in ways that are otherwise lawful." Section 1201(a)(1)(C) sets out the areas that are to be examined as part of their inquiry:

(i) the availability for use of copyrighted works; (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes; (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research; (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and (v) such other factors as the Librarian considers appropriate.

It is apparent that the Register must give special consideration to her attempts to balance the availability of works for use, the effect of the prohibition on particular uses and the effect of circumvention on copyrighted works.

3. The Necessary Showing. Although the burdens of proof for proponents and opponents of an exemption are not included in the text of the statute:

[after reviewing the record and the legislative history of the section, the Register concluded that the burden of proof for [the] proposed exemption was on the proponents of the exemption. In order to make a prima facie case for an exemption, proponents must show by a preponderance of the evidence that there has been or is likely

66 Letter from Marybeth Peters to James H. Billington, supra note 11, at 6.
68 Letter from Marybeth Peters to James H. Billington, supra note 11, at 6.
to be a substantial adverse effect on noninfringing uses by users of copyrighted works.\textsuperscript{69}

A de minimis problem, "isolated harm, or mere inconvenience would not suffice to provide the necessary showing."\textsuperscript{70} The addition of the word "substantial" before the word "adverse effect" in the language of this burden is a source of great contention for some and an issue that will be addressed later in this Article.\textsuperscript{71}

For proof of likely, or future adverse affects on noninfringing uses, "the Register found that a proponent must prove by a preponderance of the evidence that the harm alleged is more likely than not; a proponent may not rely on speculation alone to sustain a prima facie case of likely adverse effects on noninfringing uses."\textsuperscript{72} A proponent of an exemption must also show a causal link "between the prohibition on circumvention and the alleged harm."\textsuperscript{73}

Finally, all proposed exemptions are reviewed de novo. "The existence of a previous exemption creates no presumption for consideration of a new exemption, but rather the proponent of such an exemption must make a prima facie case in each three-year period."\textsuperscript{74}

4. Determination of Class of Works. One of the most contentious aspects of the rulemaking procedure is the scope of the term "class of works" as it relates to what may be exempted. The Register of Copyrights determined during the first rulemaking proceeding that "the statutory language requires that the Librarian identify a 'class of works' based upon attributes of the works themselves, and not by reference to some external criteria such as the intended use or users of the works."\textsuperscript{75} More specifically, the Register found that the statute must be interpreted as "requiring a 'class' to be defined primarily, if not exclusively, by reference to attributes of the works themselves."\textsuperscript{76}

\textsuperscript{69} Id. at 10.
\textsuperscript{70} Id.
\textsuperscript{71} Id.; see infra Part IV.C.2.
\textsuperscript{72} Letter from Marybeth Peters to James H. Billington, supra note 11, at 11.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id. The Commerce Committee addressed this issue during the DMCA's proposal period, stating:

[i]t]he issue of defining the scope or boundaries of a "particular class" of copyrighted works as to which the implementation of technological protection measures has been shown to have had an adverse impact is an important one to be determined during the rulemaking proceedings. In assessing whether users of copyrighted works have been, or are likely to be adversely affected, the Secretary shall assess users' ability to make lawful uses of works "within each
Emphasizing that it is not permissible to classify a work by reference to the type of user or use (e.g., libraries or scholarly research), the Register reasoned that the term “category” is well understood within the realm of copyright law to mean a section 102 category or copyrightable subject matter. Using section 102 categories as a starting point, the Register found that “the description of a particular class of works ordinarily should be further refined by reference to other factors that assist in ensuring that the scope of the class addresses the scope of harm to noninfringing uses.”

However, the more refined the class becomes, the less useful the exemption is to users. This refusal to consider the use or user of a work in determining the scope of the class is perhaps the largest flaw in the exemption provision and contrary to established notions of fair use.

C. THE PAST AND PRESENT EXEMPTIONS GRANTED BY THE LIBRARIAN OF CONGRESS

1. The First Exemptions (2000-2003). On October 27, 2000, the Register of Copyrights concluded that a case had been made for an exemption for two classes of works: 1) “Compilations consisting of lists of websites blocked by filtering particular class of copyrighted works specified in the rulemaking.” The Committee intends that the “particular class of copyrighted works” be a narrow and focused subset of the broad categories of works of authorship than [sic] is identified in section 102 of the Copyright Act (12 U.S.C. 102).


Letter from Marybeth Peters to James H. Billington, supra note 11, at 12. Section 102 of the Copyright Act states:

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.


Letter from Marybeth Peters to James H. Billington, supra note 11, at 26. The Register expounded on this finding, stating, for example, the class might be defined in part by reference to the medium on which the works are distributed, or even to the access control measures applied to them. But classifying a work solely by reference to the medium on which the work appears, or the access control measures applied to the work, would be beyond the scope of what a particular class of work is intended to be. And it is not permissible to classify a work by reference to the type of user or use (e.g., libraries or scholarly research).

This argument is addressed fully in Part IV.A.
software applications; and 2) Literary works, including computer programs and
databases, protected by access control mechanisms that fail to permit access
because of malfunction, damage or obsoleteness.\textsuperscript{80}

These two exemptions were granted because they were two of the limited
number of proposals that could properly be categorized under the term “class of
works”: Most proposals were unable to satisfy this burden due to the term’s
inflexibility and extremely limited scope.\textsuperscript{81} Additionally, the two were some of the
few proposals to demonstrate actual harm to their ability to engage in
noninfringing work.\textsuperscript{82}

Indeed, the legislative history reveals that Congress “anticipated that
exemptions would be made only in exceptional cases.”\textsuperscript{83} The Librarian rejected
any proposed exemptions that classified a work by reference to the type of user
or use of the work.\textsuperscript{84} This, not surprisingly, eliminated a substantial number of
the proposals.\textsuperscript{85}

Register of Copyrights concluded that a case had been made for four exemptions,
which, generally, are: 1) Compilations consisting of lists of websites blocked by
commercial filtering software that blocks access to websites, 2) Computer
programs protected by obsolete hardware locks that prevent access due to
malfunction or damage, 3) Computer programs and video games in obsolete
formats that require the original format for access and, 4) Works distributed in
ebook format when all ebook editions of the work prevent enabling of the read-
aloud function.\textsuperscript{86}

\textsuperscript{80} Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection

\textsuperscript{81} Id. at 64,563; see infra, Part IV.B.

\textsuperscript{82} See generally Copyright Office, Exemption to Prohibition on Circumvention of Copyright

\textsuperscript{83} Id. at 64,563.

\textsuperscript{84} See id.

\textsuperscript{85} See generally id.

\textsuperscript{86} Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection
at 37 C.F.R. pt. 201). The full text of the exemptions reads:

(1) Compilations consisting of lists of Internet locations blocked by commercially
marketed filtering software applications that are intended to prevent access to
domains, websites or portions of websites, but not including lists of Internet
locations blocked by software applications that operate exclusively to protect
against damage to a computer or computer network or lists of Internet locations
blocked by software applications that operate exclusively to prevent receipt of e-
mail. . . . (2) Computer programs protected by dongles that prevent access due
to malfunction or damage and which are obsolete. (3) Computer programs and
Like the previous rulemaking session, the sparse exemptions were the few that met the definition of the term “class of works” and could demonstrate actual or likely adverse effects caused by access controls. Many of the proposals were rejected because they requested either blanket proposals, use-based, or user-based proposals, of which are all impermissible under the current regulatory scheme. The Register explicitly rejected proposals for exemptions for fair use works and per se educational fair use works on their use-based status.

The Register also rejected several submissions that were not use-based because they failed to define their proposal in a way that would qualify as “a particular class of works.” Proposals for “any work to which the user had lawful initial video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access. [A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.] (4) Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling of the ebook’s read-aloud function and that prevent the enabling of screen readers to render the text into a “specialized format.”

The official website provides definitions that correspond to the exemption:
Definitions. (1) “Internet locations” are defined to include domains, uniform resource locators (URLs), numeric IP addresses or any combination thereof. (2) “Obsolete” shall mean “no longer manufactured or reasonably available in the commercial marketplace.” (3) “Specialized format,” “digital text” and “authorized entities” shall have the same meaning as in 17 U.S.C. § 121.

Exemption to Prohibition on circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62,011. A full analysis of the reasoning and effect of these provisions is beyond the scope of the paper, which focuses on the rulemaking process as a whole. For a detailed explanation of the rationale behind granting the exemption, see Letter from Marybeth Peters to James H. Billington, supra note 11.

Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62,011. Many submissions proposed an exemption for “all works,” e.g., fair use, private use, or other use-based proposals. Due to its “use-based” status, the Register also rejected a submission the proposed to exempt:
(1) Musical recordings and audiovisual works protected by access control mechanisms whose circumvention is reasonably necessary to carry out a legitimate research project where the granted exemption applies only to acts of circumvention whose primary purpose is to further a legitimate research project; and (2) Musical recordings and audiovisual works protected by access control mechanisms whose circumvention is reasonably necessary to carry out a legitimate research project.

Id. at 62,014.

Id. at 62,015.
FAIL-SAFE PROVISION IN THE DMCA

access” and “thin copyright works” failed to provide the specificity and narrow tailoring necessary to qualify for the exemption. 91

A substantial number of submissions were rejected for failure to prove evidence of actual or likely harm. 92 Those submissions whose evidence of harm was judged to be de minimis or a mere inconvenience were also rejected. 93 Additionally, some proposals were rejected because the proposal for exemption did not sufficiently demonstrate that acting pursuant to the exemption would be noninfringing use. 94

Submissions proposing an exemption for all public domain works were rejected because the Register wisely noted that the prohibition on circumvention only applies to works protected by copyright to the exclusion of works in the public domain. 95 Finally, the Register rejected all proposals that were beyond the scope of the rulemaking provision, such as webcasting, limitations of liability for online service providers, and the antitrafficking provisions of the DMCA. 96

Although these exemptions purport to remedy the apparent adverse effects of the anticircumvention provision for certain classes of users, the effectiveness of these exemptions is suspect and considered in the following section. Nonetheless, these rules will serve to exempt any users of these four particular classes of works from section 1201(a)(1)(A)’s ban on circumvention until October 27, 2006.

91 Id. “Thin copyright works” are works that contain a limited amount of copyright material. See Letter from Marybeth Peters to James H. Billington, supra note 11, at 98.

92 Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. at 62,015-17. Examples include “Any work to which the user had lawful initial access (and variations),” “Musical works, sound recordings, and audiovisual works embodied in media that are or may become inaccessible by possessors of lawfully-made copies due to malfunction, damage, or obsoleteness,” “Audiovisual works embodied in DVDs encrypted by CSS” and “published sound recordings of musical works on compact discs that use technological measures that prevent access on certain playback devices.” Id.

93 Id. at 62,015. For example: “Audiovisual works released on DVD that contain access control measures that interfere with the ability to defeat technology that prevents users from skipping promotional materials.”

94 Id. at 62,017. One submission proposed to exempt “broadcast news monitoring,” to which the Register replied “[t]he ‘limited purpose’ for which the broadcast monitors seek an exemption does not appear to constitute a noninfringing use.” Id.

95 Id. The effectiveness of this aspect is highly debatable, and is discussed infra, Part IV.

96 Id.
IV. ANALYSIS OF THE EFFECTIVENESS OF THE TRIENNIAL EXEMPTION PROVISION

Fail-Safe: Capable of compensating automatically and safely for a failure, as of a mechanism or power source; . . . . Guaranteed not to fail.\(^{97}\)

Determination of whether the exemption provision is truly a fail-safe mechanism for safeguarding fair use turns on the analysis of several key factors, including the scope of the provision, the ambiguities in the statute, burden of proof, and the treatment of the provision by the Register of Copyrights and the Librarian of Congress. The most consequential factor under this analysis, however, is the scope of the term "class of works," and, thus, what is available for exemption consideration.

A. THE CURRENT INTERPRETATION OF THE PROPER SCOPE OF THE TERM THE TERM "CLASS OF WORKS" TO BE CONSIDERED FOR EXEMPTION FRUSTRATES THE PURPOSE OF THE EXEMPTION PROVISION

By not allowing the term "class of works" to be defined by either the use or user of that work, the exemption provision runs afoul of its purpose both theoretically and pragmatically. Instead of harmonizing fair use and the anticircumvention provisions, it creates a distinct separation between the two, essentially placing them at odds with each other.

This assertion begins with the premise that the exemption was enacted to protect the ability of the public to engage in fair use.\(^{95}\) By its very nature, the use that a person makes of a copyrighted work is the focal point by which the entire determination of fair use hinges. Based upon that premise, in order to truly preserve the public's ability to make fair use of copyrighted works, any exemption granted in furtherance of fair use should focus on use first, not the intrinsic value of the work, which is simply one of the four factors to be considered in a fair use evaluation.

An exemption that is not based on the use of a work does not protect the public's ability to make fair use of a work. Instead, it is simply an exemption crafted to appeal to our notions of equity when a particular technology imposes a more onerous burden on its users than the appropriate authority is prepared to

\(^{97}\) AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 655 (3d ed. 2001).

\(^{98}\) To reiterate, the Register of Copyright affirms this purpose. "In order to ensure that the public will have continued ability to engage in noninfringing uses of copyrighted works, such as fair use, subparagraph (B) [the exemption provision] limits this prohibition [on circumvention]." Letter from Marybeth Peters to James H. Billington, supra note 11, at 4.
allow. Although this result is laudable, it is not in furtherance of the goal that spurred the creation of the exemption provision: protection of the public’s ability to engage in fair use.

In addition, the legislative history of the Copyright Act indicates that fair use is technology neutral; the doctrine must continue to function regardless of changes in technology that serve as the medium for copyrighted works. As such, instead of keeping fair use liberated from the constraints of technology, the current interpretation of the term “class of works” actually chains any potential fair use to the particular attributes of the works themselves, which are inextricably interwoven with the technology or medium that embodies the work.

As noted above, the Register limited the scope of the “class of works” language to a subset of one of the categories listed in section 102 of the Copyright Act. This determination was based on the Commerce Committee’s use of the word “category” in discussing the proper scope of the definition of the term “class of works.” The Register also noted that the Committee often used the terms “class of works” and “categories of works” interchangeably. This line of reasoning is ultimately thin, and a strained reading of the text.

The comments submitted by the Association of American Universities assert that

there is simply no reasonable support for the [Librarian of Congress’s] 2000 Final Rule’s conclusion that “classes of works” cannot be further defined based upon attributes of users or environment of use. The type of user or use are core factors in determining the right of fair use, which is at the core of this rulemaking.

The comments note that “the rulemaking provision in the statute itself expressly refers to the particular ‘user’ and ‘noninfringing uses’ of the works.”

Indeed, although several proposals for exemptions were rejected by the Librarian of Congress because they proposed a class larger than one of the


100 Letter from Marybeth Peters to James H. Billington, supra note 11, at 12.

101 Id.


103 Id.; see discussion in Part III.B.4 and accompanying notes.
categories set forth in section 102 (because use-based exemptions can apply to all categories), at least one of the previous exemptions contemplated "the inclusion of multiple categories of works, unified by a characteristic related to usability of the work . . . . In other words, certain 'classes of works' clearly can and will cut across section 102 'categories.' " The logic that classes can cut across various 102 categories instead of being a subset of 102 categories further supports the contention that classes of works can be based on the use of a work, which, unless modified, would cover all of the categories in section 102.

Using another rationale, the Librarian of Congress refused to consider use-based classes of works using the rationale that if Congress had intended for classes to be based on the use or user of the works, it could have included such a provision in the statute. A more sound interpretation, however, was that Congress's use of the word "class" instead of "category," along with the various references to the words "uses" and "users" in the statute, reflects Congress's intention that the term "classes of works" should be flexible in scope to accommodate whatever exemption the situation compels.

"If Congress had intended each 'class of works' simply to be a subcategory of a section 102 (or 103) category, and defined only based upon certain attributes of the work, it certainly 'could have said so.' However, such a limited scope is not consistent with the extensive legislative history referring to the intent to preserve fair use, especially in light of the statutory framework's reliance on the terms "users" and "noninfringing uses."

This interpretation is furthered by the fact that the Assistant Secretary for Communications and Information of the Department of Commerce, with whom the Register is compelled to confer regarding the appropriate exemptions, stated that the intended use of the work or the attributes of the user will, in certain

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104 Comments of the Association of American Universities, supra note 102, at 8. The comment refers to the exempt class of "literary works protected by malfunctioning access controls.

The Copyright Office's reasoning in recommending this class indicates that, were users to show that damage or malfunctions were preventing access to protected CDs or DVDs, for example, the category appropriately would be expanded to, e.g., "literary works, musical works, sound recordings, and motion pictures and other audiovisual works... protected by access control mechanisms that fail (due to malfunction, etc.)"

Id.

105 Letter from Marybeth Peters to James H. Billington, supra note 11, at 84-85. "Had Congress wished to exempt all circumvention when it is for the purpose of 'noninfringing use,' or 'fair use,' it could easily have done so. Giving the Librarian authority to exempt 'a particular class of copyrighted works' is not designed to accomplish that end, or even to accommodate such an end."

106 Comments of the Association of American Universities, supra note 93, at 8.

107 Id.

108 Id.
situations, be critical to the determine the meaning of a “particular class of works.”\textsuperscript{109} Although the Register of Congress addresses and considers in her recommendation to the Librarian of Congress many of the observations put forth by the Assistant Secretary, this particular assertion, while acknowledged, is essentially discarded without reply by the Register.

In defense of the Register of Copyrights, it should be noted that she has repeatedly requested in her recommendations that Congress provide her with additional guidance on the term “class of works.”\textsuperscript{110} The request is entirely valid, as previous treatment of the exemption demonstrates that the flexible nature of the scope of the term “class of works” can essentially render the exemption provision meaningless and irrelevant for the purposes of protecting fair use.

B. THE SCOPE OF THE EXEMPTION PROVISION CRIPPLES ITS ABILITY TO HAVE ANY MEANINGFUL EFFECT

The most detrimental aspect regarding the scope of the exemption provision is that it only allows for exemptions to the ban on directly circumventing an access control device.\textsuperscript{111} If a person traffics in any device or system primarily designed to circumvent an access or copy control mechanism, he or she will be guilty under the anti-trafficking provisions of the DMCA regardless of whether the exemptions relieve the person performing the direct circumvention from liability.

This limiting construction has numerous flaws. By addressing only the ban on circumvention of access control devices, Congress failed to provide any relief for the adverse effects caused by the antitrafficking provisions. As such, the exemption provision provides incomplete relief and ultimately fails to balance the adverse effects of section 1201.

Many, if not most, of the adverse effects caused by section 1201 are outside the scope of the prohibition on circumventing access controls. Instead, the effects are caused by the antitrafficking provisions of section 1201, and specifically the ban on trafficking in devices that circumvent copy control measures. For example, the submitted comments reflect adverse effects in a user's ability to make noninfringing uses of works because of copy control devices in musical works, movies, and games.\textsuperscript{112} Some of the adverse affects of DRM

\textsuperscript{109} Letter from Marybeth Peters to James H. Billington, \textit{supra} note 11, at 15.
\textsuperscript{110} \textit{Id.} at 20.
\textsuperscript{112} Letter from Marybeth Peters to James H. Billington, \textit{supra} note 11, at 103.
systems are outside the scope of 1201 altogether, such as contractual overreaching in licensing agreements and a block on the ability to fast-forward a DVD.\textsuperscript{113} The most critical and damaging aspect of the exemption provision’s limited scope is that, in most situations, an advanced understanding of software code and digital rights management is required in order to circumvent the complex and often secret algorithms, encrypted computer code, and various technological schemes employed by copyright owners.\textsuperscript{114}

For those users who cannot write software code, decrypt algorithms, or otherwise break the technologies on which companies have spent countless dollars to ensure that they will not be broken, the exemption provisions are entirely worthless, since any devices that could help them would be effectively banned by the antitrafficking provisions.\textsuperscript{115} Because most computer users are probably not sophisticated enough to circumvent such complex technological devices, the exemptions that are promulgated are, on the whole, worthless.

For example, recall that one of the exemptions to arise from the most recent rulemaking session exempts circumvention of an ebook’s access controls that prevent a view from enabling of the ebook’s read-aloud function.\textsuperscript{116} Although the

\textsuperscript{113} Id. at 109, 150.

\textsuperscript{114} An example of a DRM device that is representative of the complex nature of access and copy control devices is the Content Scrambling System, or “CSS.” In a recent Second Circuit case, the court explains that:

\textquote{[t]he studios . . . sought an encryption scheme to protect movies on DVDs. They enlisted the help of members of the consumer electronics and computer industries, who in mid-1996 developed the Content Scramble System (‘CSS’). CSS is an encryption scheme that employs an algorithm configured by a set of ‘keys’ to encrypt a DVD’s contents. The algorithm is a type of mathematical formula for transforming the contents of the movie file into gibberish; the ‘keys’ are in actuality strings of 0’s and 1’s that serve as values for the mathematical formula. Decryption in the case of CSS requires a set of ‘player keys’ contained in the compliant DVD players, as well as an understanding of the CSS encryption algorithm. Without the player keys and the algorithm, a DVD player cannot access the contents of a DVD.}


\textsuperscript{115} Professor Nimmer concurs with this logic, stating that the “fair use safeguards,” so highly touted as securing balance between owner and user interests, on inspection, largely fail to achieve their stated goals. If the courts apply section 1201 as written, the only users whose interests are truly safeguarded are those few who personally possesses sufficient expertise to counteract whatever technological measures are placed in their path.

Nimmer, supra note 2, at 739.

exemption applies to any user, it was ostensibly enacted in order for the visually impaired to take advantage of ebooks, which they can only do if the read aloud function of the ebook is enabled.\footnote{117}

However, in order to take advantage of this exemption, the visually impaired user will have to figure out a way to circumvent the access control device prohibiting enablement of the read-aloud function. This device, presumably, would be sufficiently complex in order to justify its inclusion and fulfill its prohibitive purpose. The ban on trafficking in circumvention devices essentially forces the visually impaired user to rely on his or her own expertise, or the assistance of friends within a physical proximity, in order to receive the blessing of the exemption.

It is unlikely that a substantial number of visually impaired computer users will have the technological sophistication to circumvent a technological access control device. Accordingly, with the exception of a few highly sophisticated visually impaired users, the ebook exemption is worthless because its proposed class is enable to take advantage of it.

This situation exposes the glaringly insufficient scope of the exemption provision. It also demonstrates that, notwithstanding the Register's refusal to consider the type of user for a particular class of work, Congress implicitly built in a certain type of user into every exemption: Users that are technologically sophisticated enough to directly circumvent access copy controls.

The exemption provision's shortcomings become more apparent when considering the small number and limited duration of the exemptions. The most recent rulemaking session resulted in only four exemptions of extremely limited scope that will expire in three years unless renewed. Therefore, the small number of users that can take advantage of this exemption are confronted with the possibility of losing the privilege in three years. The Register even concedes that some of the exemptions were granted notwithstanding the fact that very few people would use them.\footnote{118}

\footnote{Id.}

The final exempted class is based upon proposals by the American Foundation for the Blind . . . . It is in response to problems experienced by the blind and visually impaired in gaining meaningful access to literary works distributed as ebooks . . . . The record indicates that many ebooks are distributed with the [read-aloud] function \footnote{disabled.} disabled.

\footnote{118 The Register stated that "[a]lthough there was little need for an exemption in quantitative terms (i.e., in terms of the number of persons likely to take advantage of it directly), it was the qualitative need for an exemption that was controlling in this case." Letter from Marybeth Peters to James H. Billington, supra note 11, at 26.}
Upon examination, the limited scope of the exemption provision renders the exemptions practically worthless because the intended users are likely unable to take advantage of the waiver of liability. Additionally, the time limitation and small applicability of the exemptions will prevent the provision from serving as a meaningful protection for fair use.

C. IS THE NECESSARY SHOWING REQUIRED TO OBTAIN AN EXEMPTION TOO BURDENSOME AND FLAWED TO VINDICATE THE INTERESTS OF FAIR USE?

As previously stated, the burden for proving that an exemption is warranted is on the proponent of the exemption.\footnote{Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62,011.} The Register explicitly holds that “[i]n order to make a prima facie case for an exemption, proponents must show by a preponderance of the evidence that there has been or is likely to be a substantial adverse effect on noninfringing uses by users of copyrighted works.”\footnote{Id.} Depending on interpretation and clarification, this burden of proof could be so difficult to satisfy that it effectively prohibits passing any meaningful exemptions that would ensure the protection of fair use.

1. Does the Copyright Office Place Too Much Importance in Proof of Actual Harm Over a Likelihood of Harm Showing? The Copyright Office has held, based on previous legislative history, that “the determination [of an exemption] should be based upon anticipated, rather than actual, adverse impacts only in extraordinary circumstances.”\footnote{Id.} Furthermore, the Copyright Office requires that a showing of likelihood of harm include “distinct, verifiable, and measurable impacts.”\footnote{Id. (citations omitted).}

\begin{flushright}
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\textit{Id.} (citations omitted).
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This distinction, noticeably absent from the statutory language of section 1201 and based on an inference drawn from a suspect source, is erroneous. Apart from lacking a solid basis in legislative history, the distinction makes little sense considering the prospective and adaptive nature of the rulemaking exemption and the plausibility of providing measured evidence of future harm.

The rulemaking exemption was enacted as a triennially changing procedure ostensibly to confront new and emerging technologies that, when combined with section 1201, could affect the legal interests of the user. In our digital society, it is possible for many forms of technology to come and go within a span of a few years.

In many situations, by the time proponents of an exemption can compile distinct, verifiable, and measurable evidence of a likelihood of harm, the technology that caused the harm will be replaced by a newer, ostensibly more effective technology. This creates a vicious cycle in which the time necessary for a proponent to gather enough evidence to warrant an exemption causes that exemption to become irrelevant. This is particularly true in light of the fact that exemptions are not granted on the basis of use or user, but by the characteristics of a particular technology which, in many situations, will be obsolete before any applicable three-year exemption expires.

It is also worthwhile to consider the logic of mandating a showing of distinct, verifiable, and measurable proof of harm that has yet to occur. The Copyright Office has not specified the degree of complexity or specificity with which such proof should conform. In addition, the Assistant Secretary for Communications and Information of the Department of Commerce—the Librarian’s co-counselor in this procedure—has counseled against the requirement, stating that it “cannot logically be applied prospectively and... therefore this ‘refinement’ should be abandoned ‘and a standard more consistent with the statutory language should be adopted.'”

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123 In response to charges that the House Manager’s Report was a weak source of legislative authority, the Librarian of Congress stated that:

Some commenters [sic] have suggested that the House Manager’s Report is entitled to little deference as legislative history. However, because that report is consistent with the Commerce Committee Report, there is no need in this rulemaking to determine whether the Manager’s Report is entitled to less weight than the Commerce Committee Report.

Id. at 64,559, n.4 (citations omitted).

124 See Nimmer, supra note 2, at 693.

125 Letter from Marybeth Peters to James H. Billington, supra note 11, at 15 (citing Letter from Nancy Victory, Assistant Secretary for Communications and Information of the Department of Commerce to Marybeth Peters, Register of Copyrights (Aug. 11, 2003)).
With respect to the term “likely adverse impacts,” the Assistant Secretary stated that “there is no basis for requiring a showing of ‘extraordinary circumstances in which the evidence of likelihood is highly specific, strong and persuasive,’ and asserted that no requirements beyond ‘likely adverse effects’ are warranted.”

The Register of Congress responded to these assertions, stating that “first-hand knowledge” of harm and “actual instances of verifiable problems existing in the marketplace” with regard to evidence of existing adverse effects “did not refer to the required showing with respect to ‘likely adverse effects.’” The Register stated that actual knowledge of adverse effects could not be applied prospectively.

The Register confirmed that “[w]hile speculation alone will not be sufficient . . . proof of ‘likely adverse effects’ requires only a showing of likelihood—i.e. more likely than not, the traditional preponderance of the evidence standard. The burden of proof required by the Register is no more stringent than the statutory text.”

If the rulemaking exemption is truly going to serve as an effective countermeasure, the proponents of an exemption must be able to provide the appropriate amount of evidence in support of the exemption without including such data as numerical projections of loss, ratios, or other similar statistically verifiable burdens. In practice, if the burden is that high, eventually the pool of people who can realistically apply for an exemption with the hope of serious consideration will be only those who can afford to commission the evidence gathering studies.

Although it is unclear how specific, substantial, and material the proof of likelihood of harm must be, due to the clarification by the Register of Copyrights in her letter to the Librarian of Congress, it appears that situations seeking to fulfill the “likely adverse effects” language will face no more stringent a burden than those seeking to fulfill the “actual adverse effects” language. However, a proponent proffering likely adverse effects would probably be compelled to offer distinct and measurable evidence of a likelihood of harm. This is the same requirement for a showing of actual harm that is immensely more difficult to demonstrate prospectively. Same vein, impune the “verifiable and direct” proof of harm standard to proponents of exemption renewal proposals is questionable,

126 Id.
127 Id. at 18.
128 Id. at 19.
129 Id. at 20.
130 See generally Letter from Marybeth Peters to James H. Billington, supra note 11.
since it is unlikely that any actual evidence of harm caused by section 1201 will occur because the exemption has been in place for the previous three years.\textsuperscript{131}

2. Has the Copyright Office Raised the Amount of Harm That Must Be Shown Beyond the Language of the Statute? A great source of controversy has arisen regarding whether it was appropriate for the Copyright Office to insert the term "substantial" into the "adversely affected" language which sets forth the burden required to obtain an exemption, especially in light of the term's absence in the language of section 1201.\textsuperscript{132} Potentially, and depending on the interpreter, the term "substantial," if and when used "in relation to the quantum of evidence necessary to prove that the prohibition on circumvention has had an adverse effect on noninfringing uses of works by users of copyrighted works[,]" could increase the burden required for an exemption inconsistent with the purpose of the exemption provision.\textsuperscript{133}

Indeed, the Assistant Secretary also expressed concern that "since the word 'substantial' does not appear in the statutory text, this 'more stringent requirement


We know of no specific evidence suggesting that persons have or have not been adversely affected by the section 1201 prohibition in their ability to make noninfringing uses of literary works, including computer programs and databases, which are protected by access control mechanisms that fail to permit access because of malfunction, damage, or obsolescence. Similarly, we know of no specific evidence suggesting that persons have or have not been adversely affected in their ability to make noninfringing uses of compilations consisting of lists of websites blocked by filtering software applications. However, it is unclear how "instances of verifiable problems occurring or ... in the marketplace" can be demonstrated given that exemptions to permit circumvention with respect to these two classes have been in force since the effective date of the 1201(a) prohibition ... . It seems reasonable to presume that the adverse affects which were deemed likely to occur [in the previous exemption period] are no less likely to occur during the [upcoming three year period.]

\textit{Id.}

\textsuperscript{132} The Association of American Universities stated that:

Section 1201(a)(1) expressly states that the scope of this rulemaking is 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.' Significantly absent from the statute is the phrase 'substantially adversely affected,' yet that is the standard that the Copyright Office applied and the Librarian adopted in the 2000 Final Rule.

Comments of the Association of American Universities, \textit{supra} note 102, at 6.

\textsuperscript{133} Letter from Nancy Victory to Marybeth Peters, \textit{supra} note 125.
thus appears to add a significant new term to the express language of the statute.'

The Assistant Secretary vocalized her concern in a letter which stated that the National Telecommunications and Information Administration (NITA) was "concerned that the standard [created by the Copyright Office's "substantially adversely affected" language] imposes a significantly heightened burden on proponents of an exemption, and is therefore inconsistent with the opportunity that Congress intended to afford the user community." She further added that "no basis exists to justify insertion of a material modifier into the text of section 1201." The Register defends against this accusation, stating that the Assistant Secretary and the Register "actually appear to view the legal criteria governing this rulemaking in much the same way." The Register asserted that the addition of the word "substantial" was not meant to require a higher standard of proof, but rather was used as "a shorthand phrase to supplement and clarify what both the House Manager's Report and the House Commerce Committee Report stated," and that the "substantial adverse impact" simply means the opposite of insubstantial, or de minimis adverse impact. The Register proffered that after reading the legislative history, the addition of "substantial" does not make the burden of proof more stringent than the statutory text, "but rather is a clarification that any showing must be based on real, verifiable, and reasonable evidence."

Due to the Register's clarification with regards to the insertion of the word "substantial," it is unlikely that the Register has significantly increased the quantitative burden of proof with respect to a showing of substantial adverse effects resulting from to section 1201. However, this conclusion is difficult to validate or invalidate since there have been no substantial legal challenges to the Register's determination as to whether a proposal has met its burden.

3. Refusing to Acknowledge the Difference Between Digital and Non-digital Formats Stifles the Effectiveness of the Rulemaking Provision. The Register of Copyrights has repeatedly asserted that existing case law makes clear there is "no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical

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134 Letter from Marybeth Peters to James H. Billington, supra note 11, at 14 (citing Letter from Nancy Victory to Marybeth Peters, supra note 125).
135 Id.
136 Id.
137 Id. at 15.
138 Id.
139 Id. at 17.
format of the original." The Register uses this as rationale to minimize the difference between digital and non-digital mediums in gauging the availability of copyrighted works without DRM systems, a factor that is considered in determining the existence of adverse effects resulting from section 1201. For example, in rejecting a proposal for an exemption for public domain works, the Register reasoned that:

although the ‘digital’ version of a work may prevent certain noninfringing uses of that particular copy, that fact alone does not justify an exemption if other versions are unrestricted. Unless one can show that a particular noninfringing use can only be accomplished by using the digital version, the existence of a public domain or other work in alternative, unprotected formats provides a safety valve for noninfringing uses. Users should recognize that works in digital formats may be protected by the copyright owner differently than hard copy or analog versions of the same works and should consider this in making their purchasing decisions.

Later in this discussion of rejected proposals for exemptions, the Register states that "since books are available in many alternative formats, some of which are completely devoid of any technological protection, it would appear that traditional noninfringing uses are unaffected in some of these formats." The Library Associations’ comments assert that “the fact that a digital work has a non-digital parallel (in print or VHS format), does not mean that the print or VHS user is not adversely affected by lack of access to the digital format.” The comments point to the fact that “DVD’s are often packaged with additional content to justify a new sale, and digital works can be extracted, manipulated and reconstituted in a manner quite different from print versions.”

The Library Associations state that “the substance and quality of noninfringing use that may be made by print and VHS users can be dramatically inferior to the digital user’s experience. Yet, for purposes of this 1201 Rulemaking, such differences are deemed immaterial by the Register.” This view is supported by various other proposals for exemptions that were submitted to the Register.

140 See id. at 117 (citing Corky, 273 F.3d at 458).
141 Id. at 101.
142 Id. at 132.
143 Comments of the Library Associations, supra note 131, at 4.
144 Id.
145 Id. at 4-5.
Furthermore, the Copyright Office has interpreted the term "availability" of other works in such a draconian way as to essentially claim that a work is available in analog form regardless of how difficult it is to obtain, so long as the analog works are not completely obsolete.\textsuperscript{147} The Copyright Office adopts the same definition for the term "obsolete" as that in section 108(c) of the Copyright Act, which states that a work is obsolete if it "is no longer manufactured or is no longer reasonably available in the commercial marketplace."\textsuperscript{148}

Although this definition includes a reasonableness factor, it is possible that a work could be available from an obscure vendor that would make obtaining the work very difficult, but still available for the purposes of exemption consideration. This issue will become much more relevant as movies cease to be offered in VHS format due to the shift in popularity to DVD's, but will still be available, at least in theory, from such second hand vendors such as Ebay or used music and video stores.

Until the definition of the term "obsolete" is given further clarification for the purposes of these proceedings, it is possible that all works that have even been issued in VHS format will be considered available far into the foreseeable future. Additionally, it should be noted that the Register, in order to fully effectuate the exemption provision, should also decide whether the media player itself has become obsolete.

D. THE PRAGMATIC DIFFICULTIES INVOLVED IN SUBMITTING A SUCCESSFUL PROPOSAL FOR AN EXEMPTION ARE SO BURDENSOME THAT THEY SERVE TO FRUSTRATE THE PURPOSE OF THE STATUTE AND CHILL THE SCOPE OF POTENTIAL SUBMISSIONS

The burdens that a proposal for an exemption must meet are so great that the proponent or submitter of the exemption, presumably those harmed by section 1201, are compelled to submit only very limited, and largely de minimis, exemption proposals simply because past treatment of proposals show that if they

\textsuperscript{147} Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62,011.

\textsuperscript{148} Id.
ask for too much, their proposal will be wholly rejected. However, due to the
difficulty of the exemption proposal procedure, it is likely that most users
adversely affected by section 1201 will simply not submit a proposal at all and will
acquiesce to the compelled choice of payment or an absolute bar on access.

For example, the Library Associations, in the comments they submitted, offer
very limited and modest proposals, because “more appropriately ambitious
exemptions designed to address the growing imbalance between copyright holders
and the public with respect to access to copyrighted works were rejected by the
Register of Copyrights in the first rulemaking. The Copyright Office has made
clear that those proposed exemptions will not be reconsidered” within the
structure of exemptions for section 1201.149 The comments go on to say that
“[i]n our frank assessment, the section 1201 regulatory scheme, as implemented
by the Register of Copyrights and the Librarian of Congress, offers little promise
of meaningful relief from the genuinely adverse effects of the statutory prohibi-
tion on circumvention of technological measures that effectively control access
to copyrighted works.”150

Similarly, the comments of the Association of American Universities state that:

[B]uilding the kind of evidentiary record apparently contemplated
by the Copyright Office simply is not practical for most institu-
tions. . . . If access to allow fair use of a copyrighted work is
prevented by an access control technology and the use of that
technology truly is causing or threatening to cause significant harm
to an institution, the institution will, as a practical matter, agree to
the conditions imposed for such access (which usually means paying
increased royalties or license fees) rather than suffer the ‘substantial
adverse effects’ of foregoing such access. This is precisely the
scenario that Congress intended the triennial rulemaking to
prevent.151

This scenario is worsened by the fact that the Copyright Office refuses to make
any theoretical extensions with regard to the scope of an exemption, which
effectively requires that any exemption that is to be granted must be submitted in
a proposal.152 The fact that exemptions are granted on the character of the work

149 Comments of the Library Associations, supra note 131, at 2.
150 Id. at 1-2.
151 Comments of the Association of American Universities, supra note 102, at 2.
152 See Letter from Marybeth Peters to James H. Billington, supra note 11, at 36-38, 61. “In
principle, these considerations apply to a wide variety of works, but proponents of an exemption
have provided sufficient facts to justify only the narrower class recommended herein.”
makes submitting a proposal for every conceivable medium or work causing adverse effects to a user a practical impossibility. Therefore, even in a best-case scenario where many users are compelled to propose exemptions, it is likely that there will be many works left unconsidered due to the logistical impracticality of total coverage.

This negative effect is compounded by the fact that if assertions of harm are not submitted via the notice and comment process, the Copyright Office assumes that no harm has occurred. The Register stated in the rejection of a proposal that it appears (from the absence . . . of any assertions to the contrary) that the speculative fear of harm that was the impetus for this proposal three years ago has, in the ensuing period, failed to materialize in the marketplace. Had the fears been justified, it is quite evident that such examples would have been brought to the Copyright Office’s attention in this second rulemaking.153

This assumption is not sound, however, based upon the previous discussion that pragmatic circumstances may be such that the real harm suffered by users never finds its way to the Copyright Office. This logic should compel the Copyright Office to consider theoretical extensions for the scope of exemptions in applicable situations.

E. POSSIBLE SOLUTIONS

Ultimately, this Article concludes that the exemption provision is largely ineffective in protecting fair use. This problem could be remedied by correcting the faults of the exemption provision: the refusal to consider the use of a work, the scope of the provision, and the faulty burden of proof. Additionally, alternative solutions could vindicate the interests of users of copyrighted works. Although the relevant authorities have not adopted these theoretical solutions, implementation of such solutions would serve as an effective countermeasure to the DMCA’s anticircumvention provisions.

1. Claiming Error in Granting a Refusal to Grant an Exemption Could Serve as a Defense to Copyright Infringement. The wording of the statute makes it theoretically possible for a defendant accused under section 1201(a) who failed to win an exemption to claim, as a defense, that the Librarian of Congress erred by refusing to grant an exemption covering the type of conduct that the defendant is accused of committing.154 The rationale for such a defense would be that the defendant’s

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153 Id. at 90 (emphasis added).
154 See Nimmer, supra note 2, at 698, n.129. More specifically:
conduct falls within the criteria set out in section 1201(a)(1)(B) which, notwithstanding the Librarian’s failure to grant an exemption, should relieve the defendant from liability under section 1201(a)(1)(A).\(^{155}\)

This proposal, if implemented, could potentially serve to remedy the harm done by the Librarian’s refusal to consider the use or user of a copyrighted work in granting exemptions. Given a judge who realizes that the refusal to consider the use or user of a work contravenes the purpose of the statute, such a defense could effectuate the same kind of ad hoc and precedent—setting relief afforded by a court’s fair use determination.

However, the proposal fails to offset the damage done by the exclusion of the antitrafficking sections within the scope of the exemption provisions. Even if such a defense is recognized without the ability to rely on the assistance of those qualified to disable technologically complicated DRM systems, such relief would be available only to the select few with the appropriate ingenuity and technological know-how.

2. Anti-Circumvention Misuse. Fair use could also be furthered through an extension of the “misuse doctrine” found in patent and copyright law to the anticircumvention provisions of section 1201.\(^{156}\) Traditionally, the misuse doctrine served as a judicially created defense for alleged infringers that could prove that the plaintiff had abused or exceeded the rights granted to her, and as

\[T]\]he argument emerges from the language that Congress used: “Neither the exception under subparagraph (B) from the applicability of the prohibition contained in subparagraph (A), nor any determination made in a rulemaking conducted under subparagraph (C), may be used as a defense in any action to enforce any provision of this title other than this paragraph.” 17 U.S.C. § 1201(a)(1)(E). From that wording, even a defendant who has failed to win publication under subparagraph (C), but who convinces a court that he qualifies for the exception under subparagraph (B), is forbidden from urging that status under any doctrine of U.S. copyright law “other than this paragraph.” Id. The negative pregnant arises that he is allowed to urge the defense under this paragraph. That the paragraph in question contains the basic provision compels the conclusion that a defendant may urge his qualification under subparagraph (B), even absent publication under subparagraph (C), as a defense to a charge that he engaged in a wrongful circumvention of a technological measure. Militating against that construction, though, subparagraph (B) itself sets forth: “as determined in subparagraph (C).” 17 U.S.C. § 1201(a)(1)(B). A court attempting to reconcile these various provisions could seize on that language to reject the defendant’s activist construction of the statute.

\(^{155}\)Id.

\(^{156}\)A detailed discussion of the doctrine of misuse is beyond the scope of this Article. For more information regarding the misuse doctrine generally, and more specifically anticircumvention misuse, see Dan L. Burk, Anticircumvention Misuse, 50 UCLA L. REV. 1095 (2003).
a result, it would be inequitable to enforce those rights against the defendant.\textsuperscript{157} The misuse defense, similar to the equitable doctrine of unclean hands, could be raised by any defendant opposing the culpable plaintiff, not just the victims of the misuse.

The extension of the misuse doctrine to claims under section 1201 rests on the premise that the rights granted to a copyright owner under the anticircumvention provisions can be abused in the same manner as the other rights granted under the Copyright Act.\textsuperscript{158} Indeed, the anticircumvention provisions appears to invite abuse due to the great deal of power given to the copyright owners that can improperly be used as leverage. Because the anticircumvention provisions exist outside of the boundaries of traditional copyright, the doctrine would need to be extended order to address the improprieties caused by section 1201.\textsuperscript{159}

As an equitable doctrine, this theoretical extension could reach both the antitrafficking and anticircumvention provisions of section 1201, and provide an elasticity to conform and adapt to various situations. However, like in patent and copyright law, the misuse doctrine is of limited effectiveness since the plaintiff is free to assert her rights once the misuse has been purged.\textsuperscript{160}

3. Fair-Use Constitutional Mandate. Fair use, although a statutory right, has yet to expressly rise to the level of a constitutional requirement.\textsuperscript{161} However, such a promotion is not an absurd proposition. Indeed, the constitutional status of fair use is currently uncertain. The Supreme Court has recently stated that “[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and the useful Arts . . .’”\textsuperscript{162}

It can be argued that “if right holders can effectively prevent access to an information product through technological and contractual measures, the debate about fair use becomes irrelevant unless fair use takes on the status of a constitutionally protected right.”\textsuperscript{163} If fair use is constitutionally protected, then

\textsuperscript{157} Id. at 1113-19.
\textsuperscript{158} Id. at 1096-97. “Just as improper leveraging of patents and copyrights may properly be curtailed by application of the misuse doctrine, so improper leveraging of paracopyright should properly be curtailed by application of misuse.”
\textsuperscript{159} Id.
\textsuperscript{161} Campbell, 510 U.S. at 575. The Second Circuit stated in Corley, “[W]e note that the Supreme Court has never held that fair use is constitutionally required, although some isolated statements in its opinions might arguably be enlisted for such a requirement.” Corley, 273 F.3d at 458 (citations omitted).
FAIL-SAFE PROVISION IN THE DMCA

Courts would likely refuse to extend the DMCA to situations where it infringes on a person's ability to exercise their fair use. Although this might be the most extreme solution to the problem, it also is probably the most effective.

Until fair use is granted status as a constitutional right, "reliance on [the defense] to achieve an appropriate balance of interests in information products is futile." As discussed earlier, "[w]here potential fair users cannot access an information product, the legal protection of their right to use it is irrelevant" as one cannot use a work to which one has no access.

While such a status change for fair use would almost certainly compel vindication of fair use by the courts—if not Congress—the reactionary impact of such a decision should not be overlooked. Most notably, such a classification could serve to undermine the purpose of section 1201 or force Congress to amend the statute, leaving it largely ineffectual in an effort to fully comply with fair use. However, this point is currently relevant, since the statute is at odds with the statutory right of fair use in its current state.

Ultimately, until some solution is brought about to equalize fair use with the rights of a copyright holder, the anticircumvention provisions of section 1201 will continue to provide unbalanced power to copyright owners to the detriment of those wishing to make fair use of copyrighted works.

V. CONCLUSION

Congress enacted the triennial rulemaking exemption provision for the purpose of counterbalancing the harmful effects of section 1201(a)(1)(A) and the preservation of fair use. In theory, a rulemaking procedure for the granting of exemptions that can adapt to technological and societal variables would serve as an adequate remedy to the injustice that could arise under the DMCA. Copyright owners could protect their works from legitimate infringement and those denied the ability to make fair use of these works could simply petition the Register of Copyrights for an exemption from liability for their act of circumvention.

Unfortunately, the text and execution of the exemption provision are too flawed to serve as a meaningful remedy to section 1201's effect on the ability to make fair use of a work. Instead, the rulemaking procedure and resulting exemptions are an excruciatingly limited and largely futile exercise that assists only those with the rare need and advanced knowledge required to take advantage of the proverbial get-out-of-jail-free (but only for three years) card.

164 Id.
165 Id. at 159.
166 Id.
The Register's refusal to consider use or user-based classes for exemptions is wholly inconsistent with the principles of fair use, which is a technology-neutral doctrine that is defined by the use or user of a copyrighted work. Instead of protecting fair use, the exemptions serve as a remedy only in situations where a particular technology imposes a more onerous burden on its users than the appropriate authority is prepared to allow. Although this result is desirable over no remedy at all, it does not effectively protect a person's ability to engage in fair use of the copyrighted work.

Because the provision excludes any relief from liability of the antitrafficking provisions, users who wish to circumvent access control measures within the scope of an exemption are left to go it alone. This means that a user, without technologically or systematically trafficked assistance must decode and crack complex systems that often contain measures such as encrypted mathematical algorithms to prevent circumvention. Moreover, even if the user is able to circumvent these measures, she will be liable under section 1201 of the DMCA if she uses her system or device on a class of works not covered by an exemption or shares it through trafficking, regardless of whether the resulting use was fair.

In conclusion, perhaps the most effective way to illustrate the flawed nature of exemption provisions is to describe not those who are unable to take advantage of the exemptions, but one who is. For example, a visually impaired computer user who has an advanced understanding of software circumvention might be able to take advantage of the exemption granted to ebooks that have disabled the read-aloud function or prevented enabling screen readers. However, she must make certain that there are absolutely no existing editions of the ebook that permit the read-aloud function or enable the screen reader. If she is capable of complying with the limited exemption and circumventing the technologically complicated access control measure, she should do so with haste—the guarantee of relief from liability will expire in less than three years.

Until the execution or statutory language in the exemption provision is changed it will be an impotent protection measure and almost all of the pleas for users who request the right to make fair use of a work will fall upon deaf ears.