

TOWARDS A DOCTRINE OF “FAIR ACCESS” IN COPYRIGHT: THE FEDERAL CIRCUIT’S ACCORD

ZOHAR EFRONI*

I. INTRODUCTION

Digital copyright today seems to have reached brave new territories that were once quite remote from what intellectual property usually regulated – for instance, private consumption habits¹ or aftermarket competition in replacement products.² The expansion of right holders’ abilities to control access and use of copyrighted works is noticeable both in the digital “offline” and “online”³ environment. A significant addition to the arsenal of copyright owners is manifested in the anti-circumvention provisions of the Digital Millennium Copyright Act of 1998 [DMCA].⁴ This Article primarily focuses on one of the most ambitious attempts by copyright owners to enforce the new rights granted to them by the anti-circumvention rules and the corresponding treatment by the Court of Appeals for the Federal Circuit.⁵

The Appellant in this case (The Chamberlain Group, Inc.) aspired to exercise the new DMCA provisions against an aftermarket competitor that offered

* LL.B., Israel; LL.M. Intellectual Property, New York; Ph.D. Candidate and Scholarship Fellow, Max Planck Institute for Intellectual Property; Competition and Tax Law, Munich. The author is admitted to practice law in Israel and in the State of New York. To Lian and Miron.

¹ See generally Jessica Litman, *The Exclusive Right To Read*, 13 *Cardozo Arts & Ent. L.J.* 29 (1994) (discussing the expansion of modern copyright law to the private sphere).

² See *Lexmark Intl., Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 564 (6th Cir. 2004) (a leading manufacturer of printers and toner cartridges invoked copyright law in order to prevent the defendant from facilitating competition of others offering cheaper cartridges to printer users).

³ See e.g. *Davidson & Assocs., Inc. v. Jung*, ___ F.3d ___, 2005 WL 2095970 (8th Cir. Sept. 1, 2005) (a recent “online” application of the DMCA anti-circumvention provisions).

⁴ 17 U.S.C. §§ 1201-1205 (2000).

⁵ *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178, 1183 (Fed. Cir. 2004).

devices (remote control transmitters) that could interoperate with the Appellant's products (automatic garage door openers).⁶ The circumstances surrounding this dispute leave very little doubt that the Appellant was not sincerely attempting to protect its interest in exploiting the market for copyrighted original expressions (software responsible for the operation of the garage door).⁷ As the facts of this dispute make plain, the Appellant's motivation in filing the anti-circumvention action was to eliminate a major competitor from the market for replacement transmitters to its garage door openers, an objective that is quite alien to conventional copyright notions.⁸

This futile attempt, brought before the Court of Appeals for the Federal Circuit, triggered an unusually "user-friendly" decision when viewed in the context of previous decisions that implemented the anti-circumvention scheme articulated in the DMCA.⁹ This Article argues that the Federal Circuit in *Chamberlain* and *Storage Tech*¹⁰ (a later decision that reaffirms and expands *Chamberlain's* interpretation and application of the anti-circumvention norms) is developing a common law doctrine of "fair access." As applied, this doctrine manifests the court's own understanding of the appropriate balance between the interests of copyright owners and information users in the context of access to copyrighted works, which is quite different from Congress's policy reflected in the DMCA.

Applying the Hohfeldian model of fundamental jural relations to the anti-circumvention norms, the Article criticizes *Chamberlain's* theory, which argues that the anti-circumvention law did not establish a new property right allowing owners to prohibit access to their digital works.

⁶ *Infra* pt. III (describing the litigation and Appellant's claims).

⁷ *Infra* pt. III (showing that the Appellant did not make any effort to raise and prove any copyright infringement claims).

⁸ The Constitution provides that copyright law actually secures to "Authors" rights in their "Writings." U.S. Const. art. 1, § 8, cl. 8. Obviously, granting state-supported copyright "monopolies" to authors to exploit their original expressions creates a certain advantage over copiers in the market for those expressions. However, monopolies in the market for tangible consumer products are generally governed by antitrust law, not copyright law. *Cf.* Jacqueline Lipton, *The Law of Unintended Consequences: The Digital Millennium Copyright Act and Interoperability*, 62 Wash. & Lee L. Rev., 491-92 (2005) (noting the tension between new copyright legislation and antitrust law).

⁹ *Infra* pt. IV(B).

¹⁰ *See Storage Tech. Corp. v. Custom Hardware Engr.*, __ F.3d __, 2005 WL 2030281 at * (Fed. Cir. 2005) (manufacturer of automated data storage machines sued independent maintenance and repair company for infringement of copyrighted maintenance software and violation of the DMCA anti-circumvention provision)

In connection to a possible interpretation of the "fair access" doctrine that would allow fair use (and other copyright defenses) as a valid protection against anti-circumvention and anti-trafficking claims, it shall be argued that the Federal Circuit's decisions have paved the way not only for the incorporation of traditional copyright infringement defenses into the anti-circumvention law, but also provided solid arguments to defendants in cases where such defenses, and particularly statutory fair use, are inapplicable.

As a matter of policy, however, the Federal Circuit's concerns regarding the shaken balance in copyright as reflected in the anti-circumvention legislation are valid and justifiable. The court's analysis effectively opens up the door to an alternative judicial approach of anti-circumvention construction – the "fair access" doctrine – that might develop in the course of future disputes and furnish an effective shield for defendants in circumstances of unjustified application of the anti-circumvention rules.

The Article proceeds with a cursory description of the relevant DMCA anti-circumvention rules (Part II) and the *Chamberlain* ruling (Part III). The subsequent analysis (Part IV) closely scrutinizes two important aspects of the ruling – namely, the arguable general public right to access works and the relationship between infringement defenses and anti-circumvention liabilities.

II. THE ANTI-CIRCUMVENTION RULES

The legal framework underlying the disputes in *Chamberlain* and *Storage Tech.* involves an amendment to statutory copyright law from 1998, adding new prohibitions to the Copyright Act.¹¹ The declared purpose of the legislation of the DMCA was to "facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age."¹² One appellate court described the legislative motivation in enacting the DMCA anti-circumvention rules as follows: "fearful that the ease with which pirates could copy and distribute a copyrightable work in digital form was overwhelming the capacity of conventional copyright enforcement to find and enjoin unlawfully copied material, Congress sought to combat copyright piracy in its earlier stages, before the work was even copied."¹³

¹¹ See Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 12A.02[A]-12A.04[B][3] (LEXIS 2005) (a comprehensive description of the DMCA anti-circumvention scheme).

¹² Sen. Rpt. 105-190 at 1-2 (May 1, 1998).

¹³ *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 435 (2d Cir. 2001).

The anti-circumvention rules were aimed, *inter alia*, at implementing the relevant provisions of the WIPO Copyright Treaty (WCT)¹⁴ and the WIPO Performances and Phonograms Treaty (WPPT).¹⁵ The WCT obligates contracting parties to “provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights . . . and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”¹⁶

The DMCA anti-circumvention scheme involves three major prohibitions and several statutory exceptions. Section 1201(a)(1)(A) introduced the prohibition on *circumvention* of a technological measure that effectively controls *access* to a work protected by copyright [hereinafter the anti-circumvention provision].¹⁷ Section 1201(a)(2) [hereinafter the anti-trafficking provision] outlaws the *trafficking* in *access control* circumvention devices which fall under the three alternative settings stipulated in subsections 1201(a)(2)(A)-(C).¹⁸ The statute provides in subsections 1201(a)(3)(A)-(B) definitions for the act of “circumvent[ing] a technological measure”¹⁹ and for a technological measure that “effectively controls access to a work” in the meaning of Section (a).²⁰

Finally, Section 1201(b)(1) disallows the *trafficking* in devices that circumvent *copy control*²¹ measured in situations described under subsections 1201(b)(1)(A)-(C).²² The statute further furnishes in subsections 1201(b)(2)(A)-(B) definitions of the act of “circumvent[ing] protection afforded by a techno-

¹⁴ *WIPO Copyright Treaty*, <http://www.wipo.int/documents/en/diplconf/distrib/94dc.htm> (last accessed Oct. 11, 2005).

¹⁵ *WIPO Performances and Phonograms Treaty*, <http://www.wipo.int/clea/docs/en/wo/wo034en.htm> (last accessed Oct. 11, 2005).

¹⁶ *WIPO Copyright Treaty*, *supra* n. 14, at art. 11; *see WIPO Performances and Phonograms Treaty*, *supra* n. 15, at art. 18 (containing similar language with respect to the rights of performers or producers of phonograms).

¹⁷ 17 U.S.C. § 1201(a)(1)(A).

¹⁸ *Id.* at § 1201(a)(2)(A)-(C).

¹⁹ *Id.* at § 1201(a)(3)(A).

²⁰ *Id.* at § 1201(a)(3)(B).

²¹ *See Id.* at § 1201(b)(1) (using the term “copying” as short-hand for the exercise of any of the exclusive rights granted to authors under Section 106); *see also* U.S. Copyright Office Summary, *The Digital Millennium Copyright Act of 1998*, 3-4, <http://www.copyright.gov/legislation/dmca.pdf> (explaining the two categories of technological measures that are subject to protection under the anti-circumvention rules).

²² 17 U.S.C. § 1201(b)(1)(A)-(C).

logical measure" and of a technological measure that "effectively protects a right of a copyright owner under this title" within the meaning of Section (b).²³

The DMCA delineates a number of exceptions that are selectively applicable to the various prohibitions incorporated in the statute.²⁴ One exception to Section 1201(a)(1)(A) is actually an ongoing administrative Rulemaking Process, through which exceptions are periodically promulgated by the Librarian of Congress.²⁵ The others are statutory exceptions applicable in specific situations, such as the exception for nonprofit organizations,²⁶ for reverse engineering purposes²⁷ and for encryption research.²⁸

III. THE CHAMBERLAIN RULING

The complexity of the issues discussed in *Chamberlain* warrants a rather detailed description of the background to this dispute. Appellant, Chamberlain Group, Inc. [hereinafter Appellant] manufactured and sold garage doors together with hand-held portable transmitters (remote control devices). The technology at issue was the garage door opener system (GDO), which facilitated the opening of the door through an opening device using a portable transmitter.²⁹ The opening device mounted on the door consisted of both a receiver with associated signal processing software and a motor performing the opening and closing of the door. A homeowner wishing to open or close the garage door would activate the portable transmitter, which sends a radio frequency signal to the receiver located on the opening device. Only upon receiving a recognized

²³ 17 U.S.C. § 1201(b)(2)(A)-(B).

²⁴ See David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. Pa. L. Rev. 673, 700-02 (2000) (enumerating the various statutory exceptions, and noting that "some of section 1201's exceptions apply to the basic provision [§ 1201(a)(1)(A)] alone, others to this provision along with the trafficking ban [§ 1201(a)(2)], and others still to all three anti-circumvention bans").

²⁵ 17 U.S.C. § 1201(a)(1)(B)-(D); see also Memo. from Marybeth Peters, Register of Copyrights, to James H. Billington, Librarian of Congress, *Recommendation of the Register of Copyrights in RM 2002-4; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 4-13 <http://www.copyright.gov/1201/docs/registers-recommendation.pdf> (last accessed Oct. 11 2005) (providing a thorough explanation on the operation of the Rulemaking Process).

²⁶ 17 U.S.C. § 1201(d).

²⁷ 17 U.S.C. § 1201(f).

²⁸ *Id.* at § 1201(g).

²⁹ *Chamberlain*, 381 F.3d at 1183.

signal from the transmitter would the signal processing software activate the opening device and instruct the motor to open or close the door.³⁰

Appellant employed in its Security+ line of GDO systems – a copyrighted “rolling code” computer program that, for enhanced security purposes, constantly changed the transmitter signal required to open the door.³¹ As explained by the court, the range of recognized signals was limited, and a user transmitting too many signals might exhaust that range. In order to facilitate multiple transmitter frequencies, Appellant developed a “resynchronization” sequence which would activate the door after comparing and calculating two signals sent one after another in rapid succession.³²

Appellee, Skylink Technologies, Inc. [hereinafter Appellee] – the major competitor for Appellant’s universal transmitters – began marketing and selling transmitters in 1992 and recently introduced its Model 39 which was designed to interoperate with common GDOs, whether supported by “rolling code” software or not.³³ Although Model 39 did not use “rolling code” technology, it was able to simulate the effect of the rolling code. By sending three codes in rapid succession, the Model 39 transmitter would send the initial (fixed) signal required for activating the door or imitate the operation of the “resynchronization” sequence (with the second and third signals). As a result, one press of the button of a Model 39 transmitter would activate the opening device affixed on Appellant’s doors.³⁴

Two district court decisions preceded the ruling of the Federal Circuit in *Chamberlain*, namely, *Chamberlain I*³⁵ and *Chamberlain II*.³⁶ Appellant appealed the *Chamberlain II* decision before the Federal Circuit. On appeal, the court focused on Appellant’s contentions that (i) both the door opener and the transmitter incorporated computer programs “protected by copyright;” (ii) roll-

³⁰ *Id.* The court further noted that both the opener and the transmitter were sold to consumers by Appellant. Replacement or spare transmitters – the so-called “universal transmitters” (which interoperate with GDOs regardless of kind or model) – could be purchased in the aftermarket. *Id.* The two major dealers in that market were Appellant and Appellee. *Id.*

³¹ *Chamberlain*, 381 F.3d at 1184 (showing that the program increases the rolling code by factor of three each time the user activates the transmitter).

³² *Id.*

³³ *Id.* However, one of Skylink’s settings for its Model 39 was designed to interoperate only with Appellant’s rolling code GDOs. *Id.*

³⁴ *Chamberlain*, 381 F.3d at 1184-85.

³⁵ *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 292 F. Supp. 2d. 1023 (N.D.Ill. 2003) [hereinafter *Chamberlain I*].

³⁶ *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 292 F. Supp. 2d 1040 (N.D.Ill. 2003) [hereinafter *Chamberlain II*].

ing codes were "technological measures" that "control access" to these programs (or more precisely, to the door opener program); and (iii) Appellee, trafficking in transmitters that, absent of Appellant's authority, imitate the function of the rolling code and allowed "access" to the program, violated the trafficking prohibition in Section 1201(a)(2).³⁷

The appellate court begun its analysis of Section 1201(a) by holding that the anti-circumvention provisions of the DMCA did not establish new property rights,³⁸ and that circumvention regulated by Section 1201(a) should be distinguished from copyright infringement. The court held that the DMCA merely created a new cause of action under which a defendant may be liable.³⁹ The Federal Circuit affirmed *Chamberlain II* in holding that a plaintiff, attempting to establish circumvention liability, must show that circumvention was not authorized. In analyzing the burden allocation issue, the Federal Circuit held:

The premise underlying this initial assignment of burden is that *the copyright laws authorize members of the public to access a work* [emphasis added], but not to copy it. The law therefore places the burden of proof on the party attempting to establish that the circumstances of its case deviate from these normal expectations; defendants must prove authorized copying and plaintiffs must prove unauthorized access.⁴⁰

The court hence concluded that Section 1201 "prohibits only forms of access that bear a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners."⁴¹ In light of the above, requiring a "reasonable relationship" between "access" and copyright protections otherwise granted to owners was said to be the "only meaningful reading of the statute."⁴²

The court went on to articulate the necessary elements of a cause of action under the anti-trafficking provisions. It held that a plaintiff alleging a violation of § 1201(a)(2) must prove: (1) ownership of a valid copyright on a work, (2) effectively controlled by a technological measure, which has been circumvented, (3) that third parties can now access (4) without authorization, in a manner that (5) infringes or facilitates infringing a right protected by the Copyright

³⁷ *Chamberlain*, 381 F.3d at 1185 (notably, Appellant claimed neither copyright infringement of its programs nor contributory copyright infringement committed by Skylink).

³⁸ *Id.* at 1192.

³⁹ *Id.* at 1192-93 ("[the] distinction between property and liability is critical. Whereas copyrights, like patents, are property, liability protection from unauthorized circumvention merely creates a new cause of action under which a defendant may be liable. The distinction between property and liability goes straight to the issue of authorization").

⁴⁰ *Id.* at 1193.

⁴¹ *Chamberlain Group*, 381 F.3d at 1202.

⁴² *Id.* at 1202-03.

Act, because of a product that (6) the defendant either (i) designed or produced primarily for circumvention; (ii) made available despite only limited commercial significance other than circumvention; or (iii) marketed for use in circumvention of the controlling technological measure.⁴³

Since Appellant had failed not only in satisfying the fourth element (lack of authority) but also in establishing the necessary nexus articulated in the fifth element (the connection to a right protected by the Copyright Act), the Appellant's action was dismissed.⁴⁴

IV. ANALYSIS

The *Chamberlain* decision touches upon a myriad of complex copyright issues. The court is confronted with the task of construing a law that addressed the challenging task of adjusting copyright law to bring it in line with the digital era.⁴⁵

The following analysis suggests that *Chamberlain* performed a considerable deviation from the textual and contextual framework of the law in order to promote a certain policy. The court has possibly sought to secure reasonable public access to works and preserve an applicable fair use defense in unauthorized access/trafficking disputes. Nothing concerning these objectives, as such, is inherently objectionable, especially when the court is challenged with applying the restrictive language of the DMCA to the peculiar factual setting at bar. A straightforward, literal application of the law, as Appellant would have it, could bring about unreasonable and absurd results indeed.⁴⁶ At the same time, as a matter of systematic analysis, the holding in *Chamberlain* raises serious doubts regarding the compatibility of its doctrine with the DMCA and perhaps also with previous caselaw implementing it.

Two significant premises profoundly underlie *Chamberlain's* interpretation of the DMCA anti-circumvention provisions. The court submits that U.S.

⁴³ *Id.* at 1203.

⁴⁴ *Id.* at 1204.

⁴⁵ The House Judiciary Committee, evaluating the introduction of anti-circumvention regulations, observed:

The digital environment now allows users of electronic media to send and retrieve perfect reproductions of copyrighted material easily and nearly instantaneously, to or from locations around the world. With this evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted works.

H.R. Rpt. 105-551 pt. 1 at 13 (May 2, 1998); *see also* H.R. Rpt. 105-551 pt. 2 at 28-38 (May 2, 1998) (House Commerce Committee report on the DMCA Bill).

⁴⁶ *Chamberlain*, 381 F.3d at 1200-1201.

copyright law generally authorizes the public to access copyrighted works.⁴⁷ Occasionally, the court even speaks in terms of “property rights that the Copyright Act has long granted to the public.”⁴⁸ How could such propositions be consolidated with new provisions in the Copyright Act that enforce right holders’ entitlement to exclusively control access to works *via* employment of effective technological protection measures [TPMs]? The court’s answer is that the anti-circumvention rules, and specifically, the anti-trafficking provision, are not to be construed as vesting new property rights in copyright owners.⁴⁹ Instead, the anti-circumvention law is said merely to be adding new causes of action helping proprietors to secure their traditional copyrights.⁵⁰

Armed with this logic, *Chamberlain* adds to the cause of action based on the anti-trafficking provision (and presumably, also the anti-circumvention provision),⁵¹ a necessary element that has no trace in the text of Section 1201(a). Namely, a plaintiff must prove a “reasonable relationship” between access facilitated by the accused device and the violation of traditional copyrights in order to successfully establish a *prima facie* case of unlawful trafficking.⁵² Such construction may call for a copyright infringement analysis and render relevant defenses concerning traditional exclusive rights evocable within the scope of anti-trafficking actions. So, although the text of neither the anti-circumvention nor the anti-trafficking provisions conditions liability with showing a link to activity that interferes with traditional copyrights. In the course of such in-

⁴⁷ *Id.* at 1193 (“the copyright laws authorize members of the public to access a work, but not to copy it.”).

⁴⁸ *Id.* at 1204 (“The DMCA does not create a new property right for copyright owners. Nor, for that matter, does it divest the public of the property rights that the Copyright Act has long granted to the public.”).

⁴⁹ *Id.* at 1192.

⁵⁰ *Id.* at 1204. (“The anti-circumvention and anti-trafficking provisions of the DMCA create new grounds of liability.”).

⁵¹ The Appellant in *Chamberlain* claimed violation of the anti-trafficking provision, not the anti-circumvention provision. *Id.* at 1183. Hence, statements in *Chamberlain* concerning the correct interpretation of Section 1201(a)(1)(A) might be technically considered *dictum*. As the analysis below reveals, however, *Chamberlain* endeavored to provide a constructive scheme to section 1201 as a whole, according to which the plaintiff must show the “reasonable relationship” element in *both* types of action under sections 1201(a)(1)-(2). *Id.* at 1195. To dispel any doubt about the applicability of the “fifth element” to claims based on the anti-circumvention provision, see *Storage Technology Corp.*, WL 2030281 at 9-11.

⁵² *Chamberlain*, 381 F.3d at 1202 (“[w]e conclude that 17 U.S.C. § 1201 prohibits only forms of access that bear a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners”).

fringement analysis, it appears that legal defenses to copyright infringement, most prominently the fair use defense, might play a relevant role.⁵³

This article shall further explore two intriguing issues derived from the *Chamberlain* ruling, issues that entail significant implications on the operation of the DMCA within the copyright law system in the U.S.: (1) Does the public have a general “right” secured by copyright law to have access to copyrighted works? (2) What role does the fair use doctrine play within the anti-circumvention framework?

A. The Public Access-Right Theory

Chamberlain's theory about consumers' “right” to “access” copyrighted computer programs may be subject to two lines of interpretation. According to the narrow view, *Chamberlain* is merely pronouncing the obvious entitlement of lawful purchasers of consumer electronics with embedded computer programs responsible for customary device operation to use the said device.

This holds true even if operation of the product is considered performing “access” to the copyrighted computer program, and despite technological protection measures that are employed by manufacturers in order to control such access. It follows that homeowners who bought Appellant's GDOs may use them without (copyright) restrictions by virtue of an *implied license* to “access” the programs as lawful purchasers of the GDOs.⁵⁴ For that reason, also dealers in devices and technologies that can help consumers to operate lawfully purchased products are not liable under the anti-trafficking provision.⁵⁵

Under this narrow “implied license” interpretation, the court could have dismissed the DMCA claims against the Appellee merely on the grounds that access by users was *authorized* and trafficking in devices that enable authorized

⁵³ *Infra* Pt. IV(B).

⁵⁴ *Chamberlain*, 381 F.3d at 1202 (“[c]onsumers who purchase a product containing a copy of embedded software have the inherent legal right to use that copy of the software.”) *See also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 564 (6th Cir. 2004) (Feikens, J., dissenting in part) (finding that “when the consumer buys the printer, the consumer must be buying the right to use not just the physical printer components, but also the Printer Engine Program that allows those physical components to produce printed pages. By buying a Lexmark printer, the consumer acquires an implied license to use the Printer Engine Program for the life of that printer.”).

⁵⁵ *Chamberlain* at 1204 (“[t]he Copyright Act authorized Chamberlain's customers to use the copy of Chamberlain's copyrighted software embedded in the GDOs that they purchased. Chamberlain's customers are therefore immune from § 1201(a)(1) circumvention liability. In the absence of allegations of either copyright infringement or § 1201(a)(1) circumvention, Skylink cannot be liable for § 1201(a)(2) trafficking.”)

access cannot be held illicit according to Section 1201(a)(2).⁵⁶ This could have spared the court from triggering a more general and complex inquiry about the nature of entitlements vested by copyright law in the public and the nature of the legal instruments granted by the DMCA to copyright owners.⁵⁷

However, the legal framework offered by the court gives rise to a more expansive scope of users' rights and bears far broader implications. The court vindicated two stipulations to support the "fifth element" it added to the anti-trafficking provision: (1) The DMCA should not be read as granting new property rights to owners, but only as providing additional grounds for liability⁵⁸; and (2) Copyright law secures certain rights to the public and generally authorizes members of the public to access works.⁵⁹

There is, of course, a logical relationship between the two stipulations. Copyright law, which is arguably devoted to optimize general availability of works to the public⁶⁰, cannot be said to furnish in the same breath a broadly defined property right to withhold access.⁶¹ Since the new anti-circumvention provisions manifested a deviation from the customary state of affairs in copyright (as stated in the second stipulation), owners must show that access was

⁵⁶ *Id.* at 1193 ("[t]he DMCA, however, defines circumvention as an activity undertaken 'without the authority of the copyright owner' . . . The plain language of the statute therefore requires a plaintiff alleging circumvention (or trafficking) to prove that the defendant's access was unauthorized"); see also *supra*, n. 36 (dismissing plaintiff's anti-trafficking claims on the ground that access through use of the GDOs was authorized).

⁵⁷ Section 1201(a) outlaws only activities that are performed "without the authority of the copyright owner." 17 U.S.C. § 1201(a)(3)(A) (2005). However, a ruling that would merely accept the argument that appellant did not limit in any way (technically or contractually) the use of "unauthorized" transmitters could invite appellant to affirmatively do so (e.g. through licensing agreement) to bypass this legal hurdle. Possibly in order to curtail such strategy, *Chamberlain* upgraded users' entitlement to a status of the most "fundamental right" conferred upon consumers by the Copyright Act. *Chamberlain*, 381 F.3d at 1203 ("[t]he DMCA cannot allow Chamberlain to retract the most fundamental right that the Copyright Act grants consumers: the right to use the copy of Chamberlain's embedded software that they purchased.").

⁵⁸ *Chamberlain*, 381 F.3d at 1192.

⁵⁹ *Id.* at 1193.

⁶⁰ *E.g. Twentieth Cent. Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("[c]reative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting *broad public availability* [emphasis added] of literature, music, and the other arts").

⁶¹ *Chamberlain*, 381 F.3d at 1200 ("[appellant's] proposed construction of § 1201(a) implies that in enacting the DMCA, Congress attempted to 'give the public appropriate access' to copyrighted works by allowing copyright owners to deny all access to the public. Even under the substantial deference due Congress, such a redefinition borders on the irrational").

“unauthorized.”⁶² And since, according to the first stipulation, the DMCA did not introduce a new property right to control access (i.e., copyright law does not render unauthorized access impermissible), any cause of action under the anti-circumvention law must show a link between “access” and “protection” (i.e., violation of traditional exclusive rights).⁶³

1. Shortly About Legal “Rights”

Chamberlain makes extensive use of the fundamental legal term “right” both in describing the interests secured by copyright law to users and in connection with what the anti-circumvention provisions do *not* vest in copyright holders employing TPMs. Thus, before proceeding, it appears instructive to take a brief glance at some doctrinal principles that underlay the legal meaning of “rights.”

The Restatement (First) of Property adopted the following definition: “A right . . . is a legally enforceable claim of one person against another, that the other shall do a given act or shall not do a given act.”⁶⁴ In fact, this definition, as well as the general schematic model of jural relations that had a fundamental influence on modern American legal thought, is derived from the writings of Professor Wesley Newcomb Hohfeld, dating back to the early Twentieth Century.⁶⁵

Recently, some commentators have applied the Hohfeldian model in analyzing copyright law in general and, specifically, the anti-circumvention rules.⁶⁶ Discussing the model in detail goes beyond the scope of this Article, but a cursory introduction may still be helpful in emphasizing its relevant aspects and in providing effective analytical tools.

Hohfeld’s central mission was to “clean” the legal vocabulary. His insight was that certain words of critical importance in the legal discourse had no

⁶² *Id.* at 1193.

⁶³ *Id.* at 1197.

⁶⁴ *Restatement (First) of Property* § 1 (1936).

⁶⁵ See Curtis Nyquist, *Teaching Wesley Hohfeld’s Theory of Legal Relations*, 52 J. Leg. Educ. 238, 238 (2002); see generally Nigel E. Simmonds, *Introduction in Fundamental Legal Conceptions as Applied in Judicial Reasoning*, ix (David Campbell & Philip Thomas eds., Ashgate Dartmouth 2001).

⁶⁶ See e.g. Thomas Heide, *Copyright in the E.U. and U.S.: What “Access Right”?* 48 J. Copy. Soc’y. 363, 365-66 (2001); David R. Johnstone, *Debunking Fair Use and Copyduty Under U.S. Copyright Law*, 52 J. Copy. Soc’y. 345, 358-367 (2005).

agreed meaning and that muddled language leads to muddled thought.⁶⁷ Hohfeld stressed that "whether legal or non-legal, chameleon-hued words are a peril both to clear thought and to lucid expression."⁶⁸ He then insightfully and logically arranged all possible legal positions in four pairs, which he denoted "the lowest common denominators of the law."⁶⁹ His taxonomy of opposite positions is illustrated in the following table:

Position	Right-Claim	Privilege	Power	Immunity
Opposite	No-Right	Duty	Disability	Liability

Within each pair of opposites, the two positions are mutually exclusive. It follows that A can have *either* a right *or* a "no-right" to do a certain act vis-à-vis B (or to compel B to refrain from doing an act), depending on the terms and scope of his position. For instance, within the right/no-right rubric of opposites alone (considered separately from other parallel relations between the same parties), A may have either a right to exclude B from his land or a "no-right" to exclude B. Similarly, within the privilege/duty rubric alone concerning the act of entering, B may have either a privilege to enter A's land or a duty to stay off.⁷⁰

Jural relations are to be reduced and analyzed as existing between two persons, and in the bilateral sense, for each person having a legal position there is a correlative legal position held by another. The correlation relationship could be demonstrated as follows:

Position	Right-Claim	Privilege	Power	Immunity
Correlative	Duty	No-Right	Liability	Disability

⁶⁷ Hohfeld, referring to the legalese commonplace in courts, complained about "the inveterate and unfortunate tendency to confuse and blend the legal and the non-legal quantities in a given problem," as well as about "the ambiguity and looseness of our legal terminology." Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 20-21 (1913).

⁶⁸ *Id.* at 29.

⁶⁹ *Id.* at 58.

⁷⁰ *Id.* at 32.

As seemingly most pertinent to the current discussion, the focus here is on the right/duty and the privilege/no-right correlative relationships. In the Hohfeldian sense, A has a “right” when he has an enforceable “claim” against B (who is necessarily a duty bearer) if B does not act in accordance with his duty (hence the common denotation of “right-claim” or “claim-right”).⁷¹ However, if B holds a privilege against A to do X, he does not have a duty towards A not to do X and A necessarily cannot legally compel him not to exercise his privilege, since A is in a status of “no-right.”⁷²

An important point must be stressed here: In Hohfeldian terms, A (the “no-right” holder) does not *necessarily* owe B (the privilege holder) a duty not to interfere with the exercise of his (B’s) privilege, unless B holds a right-claim of noninterference. That means first that B, by virtue of his privilege *per se*, does not have a claim against A if A stands in his way to exercise the privilege. Second, A cannot, without more (e.g., a specific right-claim to interfere with B’s general privilege), legally enforce his interference since he is in a “no-right” position.⁷³

Regarding property interests (but not only property, of course), a myriad of legal relationships are possible between the same parties. For instance, A, the owner of Blackacre, can have a right-claim against B to prevent B’s non-permissible entry and B has a correlative duty not to trespass on Blackacre. In addition, A can hold a privilege to enter Blackacre *himself*, correlated by B’s “no-right” to restrict A’s privilege to enter. Further, A may have a right-claim against B that would impose a duty on B not to interfere with A’s access privilege. Accordingly, A, the owner, holds a bundle of both rights and a privilege, which constitute his legally protected interests in Blackacre.

As it turns out, privileges may conflict. For instance, A can have a privilege to use a public street (say, to walk through) whereas B is in a position of “no-right” to prevent it. However, B could simultaneously have a similar

⁷¹ *Id.* at 31-32; see also *Restatement (First) of Property* §1 cmt. a (“[t]he relationship indicated by the word ‘right’ may also be stated from the point of view of the person against whom that right exists. This person has a duty, that is, is under a legally enforceable obligation to do or not to do an act”).

⁷² “The privilege . . . is the negation of a duty.” Hohfeld, *supra* n. 67, at 32.

⁷³ Hohfeld illustrated the situation with the following example: “the privileges could, in a given case exist even though the rights mentioned did not. A. B. C. and D, being the owners of [a] salad, might say to X: ‘Eat the salad, if you can; you have our license to do so, but we don’t agree not to interfere with you.’ In such a case, the privileges exist, so that if X succeeds in eating the salad, he has violated no rights of any of the parties. But it is equally clear that if A had succeeded in holding so fast to the dish that X couldn’t eat the contents, no right of X would have been violated.” *Id.* at 35.

privilege to walk through the same street, whereas A is in a "no-right" position to prevent it. If the street is so narrow to allow the passage of only one person, the two privileges may collide, and it might be necessary to attach to one of the parties a duty of noninterference, which is, according to Hohfeld, a matter of "justice and policy."⁷⁴

A brief revisit to Hohfeld's insights about the power/liability constellation is advisable, as such constellation shall prove its critical importance later on. As derived from the tables above, a "power" is the jural opposite of disability and the jural correlative of liability. But what does it actually mean? The position of "power" becomes relevant when A can volitionally change the legal position of himself and others. A "whose volitional control is paramount may be said to have the (legal) power to effect the particular change of legal relations that is involved in the problem."⁷⁵

Accordingly, owner A may have the power to transfer his interests in Blackacre to B through sale, and by exercising this power he extinguishes his own interest (for example, his own right to exclude B from the premises or his own privilege to reside there), while creating new and corresponding interests in B.

Hohfeld characterized power as "one's affirmative 'control' over a given legal relation as against another."⁷⁶ Understandably, in the typical case of A's power to transfer property interest to B, A may be required to first have the legal entitlement to this interest himself.⁷⁷ A usually cannot transfer ownership interests to B (i.e., A doesn't have the *power*) unless he (A) is entitled to these interests himself or has been empowered by the interest holder to do so.⁷⁸ In turn, B by definition cannot be subject to liability *vis-à-vis* A unless A has the

⁷⁴ See *Id.* at 36 (classifying "liberty" as actually having the meaning of a privilege that can subsist independently of a "right" of third parties not to interfere with that privilege, while attaching such right as a matter of policy).

⁷⁵ *Id.* at 44. Hohfeld provides many examples of legal powers such as the power of the owner of personal property to extinguish his own legal interests through abandonment, a transfer, or a contract. Powers are also manifested in agency situations, where the agent is granted a power that creates a correlative liability in the principal. *Id.* at 45-46.

⁷⁶ *Id.* at 55.

⁷⁷ For the limited purposes of the discussion, we may assume that both actors are private parties where their private property interests are evaluated. If A is the government (or someone who fulfills a governmental or administrative function) the analysis might prove more complicated. Consider, for example, the eminent domain power of the government to destroy private property interests. Cf. Simmonds, *supra* n. 65, at 20.

⁷⁸ The rule of thumb can be that A cannot give away what he doesn't have and can't take what doesn't belong to him (with some deviation resulting primarily from agency situations that are not at focus here).

legal power to change B's position.⁷⁹ The point may seem obvious, but in complex constellations of various legal interests applicable to a certain bilateral relationship, it might turn evasive.

The Hohfeldian model provides powerful tools to analyze and define legal problems. It does not necessarily offer answers to the question of which actor *should* have a certain legal interest in a certain situation. Instead, it helps to determine what type of interest is actually held by the actor according to a given legal constellation.

The relevancy of the foregoing classification in analyzing *Chamberlain* will emerge while examining the court's usage of the terms "right" in the context of copyright law. With Hohfeldian insights in mind, the Article shall further scrutinize *Chamberlain's* theory on three levels: Constitutional, pre-DMCA Copyright Act and post-DMCA Copyright Act.

2. The Constitutional Level⁸⁰

The power of Congress to enact copyright laws emanates directly and explicitly from the Constitution. The Copyright Clause of the U.S. Constitution provides: "[T]he Congress shall have Power . . . [t]o promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings."⁸¹

At least the plain Constitutional language does not suggest any granting of "rights" to the public.⁸² Instead, the Copyright Clause can be said to authorize Congress to secure, i.e., define by law, substantive rights of authors as a means to achieve the ultimate goal of copyright – promoting the progress of science.⁸³ That is, the "constitutional command" in enacting copyright laws is to create a "system" that promotes the progress of science.⁸⁴ The philosophy behind the Copyright Clause (and, in turn, the one that underlies the system enacted by Congress) basically recognizes that providing economic incentives to

⁷⁹ See also Heide, *supra* n. 66, at 365 n. 9.

⁸⁰ The discussion in Part IV(A)(2) is partly based on Zohar Efroni, *A Momentary Lapse of Reason: Digital Copyright, the DMCA and a Dose of Common Sense*, 28 Colum. J.L. & Arts 249, 271-72 (2005).

⁸¹ U.S. Const. art. 1, § 8, cl. 8.

⁸² Interestingly, it does not "command," in the literal sense, any "rights" on the part of authors either. "Congress shall have the Power" does not necessarily mean that Congress *must* or *shall* secure exclusive rights to authors.

⁸³ See *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003).

⁸⁴ *Id.* (quoting *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966)).

individuals driven by profit-making goals is the "best way to advance public welfare."⁸⁵

An argument that is often employed in order to extract a balancing counterweight in copyright in favor of the public draws on the constitutional "Purpose Clause" – "To promote the Progress of Science." The gist of the argument is that private copyright monopolies that are not supporting social progress are arguably unjustified.⁸⁶ Assuming a positive correlation between public access to copyrighted works and the promotion of social progress, one may deduce a constitutional foundation to the assertion that copyright laws shall not unduly impair public access to works.

Strolling along these lines, *Chamberlain* takes an additional step forward. The court's rhetoric suggests that copyright law should be interpreted as supporting a public *right* to have appropriate access to copyrighted works. This postulation draws on the recent U.S. Supreme Court decision in *Eldred v. Ashcroft*. There, the Court considered, *inter alia*, whether Congress's exercise of the legislative power conferred upon it by the Copyright Clause – while extending the copyright protection term – was rational.⁸⁷

The simple point *Eldred* was making is that in questions of rational exercise of the legislative power to enact copyright law, courts would substantially defer to Congress.⁸⁸ In support of this very conviction, the *Eldred* Court provided the following citation from *Sony*: "[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . . in order to give the public appropriate access to their work product."⁸⁹

Chamberlain, blending *Sony* and *Eldred*, provided as follows

[T]he Supreme Court recently explained [that], 'Congress' exercise of its Copyright Clause authority must be rational.' In determining whether a par-

⁸⁵ *Id.* at 212 n.18 (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)).

⁸⁶ *See Id.* ("copyright law serves public ends by providing individuals with an incentive to pursue private ones"); *see also Metro-Goldwyn-Mayer Studios Inc., v. Grokster, Ltd.*, 125 S. Ct. 2764, 2794 (2005) (Breyer, J., concurring) (citing *Twentieth Century Music Corp.*, 422 U.S. at 156) ("Creative work is to be encouraged and rewarded, but private motivation *must* ultimately serve the cause of promoting broad public availability of literature, music, and the other arts" (emphasis added)); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (quoting *U.S. v. Paramount Pictures*, 334 U.S. 131, 158 (1948)) ("[t]he copyright law . . . makes reward to the owner a secondary consideration").

⁸⁷ *Eldred*, 537 U.S. at 204-05.

⁸⁸ *Id.* at 204 ("[W]e turn now to whether it is a rational exercise of the legislative authority conferred by the Copyright Clause. On that point, we defer substantially to Congress.").

⁸⁹ *Id.* (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)).

ticular aspect of the Copyright Act ‘is a rational exercise of the legislative authority conferred by the Copyright Clause . . . we defer substantially to Congress. It is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . . *in order to give the public appropriate access* [emphasis added] to their work product.’ Chamberlain's proposed construction of § 1201(a) implies that in enacting the DMCA, Congress attempted to ‘give the public appropriate access’ to copyrighted works by allowing copyright owners to deny all access to the public. Even under the substantial deference due Congress, such a redefinition borders on the irrational.⁹⁰

Even a careful reader of the foregoing passage might easily draw the following two conclusions: (1) *Eldred* held that the purpose of copyright law, as derived from the Copyright Clause, is to give the public appropriate access to copyrighted works; and (2) according to *Eldred*, when Congress enacts copyright laws, it is actually (perhaps primarily) attempting to give the public appropriate access to copyrights works.

Both conclusions are mistaken. First, the crucial statement was rendered by *Sony*, not *Eldred*. Second, *Sony* explicitly clarified that the public access to expressions intended by copyright law is fulfilled only *after* the expiration of the copyright term, stating “[i]t is intended to motivate the creative activity of authors . . . by the provision of a special reward, and to *allow the public access to the products of their genius after the limited period of exclusive control has expired.*”⁹¹

Hence, a plausible reading of *Sony* is that the public interest in having broad access to works during the protection term is subordinated to the exclusive interests of right holders. Even according to *Sony*, public access is to be achieved *via* the exclusive copyrights, not necessarily by compromising them.

The role and function of the Copyright Clause (and the Purpose Clause in specific) as a possible constitutional limit on Congressional power to grant copyright monopolies is a controversial matter.⁹² Also controversial is the question whether the Copyright Clause operates as a constitutional guarantee to the interests of those who are not copyright owners. Some commentators believe that the Copyright Clause actually guarantees some specific public interests,

⁹⁰ *Chamberlain*, 318 F.3d at 1200.

⁹¹ *Sony Corp. of Am.*, 464 U.S. at 429 (emphasis added).

⁹² See e.g. Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 Colum. L. Rev. 272 (2004) (examining the issue whether the Intellectual Property Clause of the US Constitution operates in reality as a constraint on Congressional power to grant private monopolies, and answering in the negative).

among them, the entitlement to access copyrighted works.⁹³ In any event, *Chamberlain's* hints about a "default" public right to access copyrighted works in the broad sense - that is, beyond an implicit or explicit license - appear more ambitious than the philosophy communicated by authorities the court supposedly relies on.

3. The Pre-DMCA Level

Scrutinized at the second level, and as a matter of textual formation, the Copyright Act speaks very sparsely, if at all, about "rights" of individuals, groups or the general public that are not "authors."⁹⁴ Instead, Section 106 of the Copyright Act enumerates an exhaustive list⁹⁵ of "exclusive rights"⁹⁶ granted to authors "to do and to authorize" certain actions with respect to a "work."⁹⁷ For instance, two very significant exclusive rights secured to authors are the right of reproduction⁹⁸ and the distribution right.⁹⁹ Thus, the plain text of the law that is

⁹³ See e.g. L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. Copy. Socy. 365 (2000) (arguing that the Copyright Clause should be read as securing the right of the public to access copyrighted works as well as protecting the public domain); Harry N. Rosenfield, *The Constitutional Dimension of "Fair Use" in Copyright Law*, 50 Notre Dame Law. 790, 791, 807 (1975). Rosenfeld actually *defines* fair use as "the right of reasonable access to copyrighted materials," and argues that the fair use doctrine, so defined, enjoys constitutional protection. *Id.* at 791. Alternatively, he submits that fair use is a vehicle for securing what he calls "the constitutional right of access." *Id.* at 807.

⁹⁴ There is, perhaps, one notable exception to this general rule, embodied in section 108 of the Copyright Act, captioned "Limitations on exclusive rights: Reproduction by libraries and archives." 17 U.S.C. § 108. For instance, sections 108(b) and 108(d) speak of "the right of reproduction and distribution [granted to libraries and archives in certain circumstances under section 108.]" *Id.* §§ 108(b), (d). Similarly, section 108(c) refers to the libraries' and archives' "right of reproduction," while section 108(f) mentions occasionally "the right of fair use." *Id.* §§ 108(c), (f). However, it seems that the Act does not provide a correlative duty on the part to copyright owners to enable libraries and archives to exercise their "rights" of reproduction and distribution *per* section 108. In Hohfeldian terms these entitlements are in fact, absent of legal enforcement mechanism, statutory privileges, not rights.

⁹⁵ *Id.* § 106. The legislative history of the Copyright Act indicates that the list in section 106 is conclusive: "The first three clauses of section 106, which cover *all rights under a copyright* except those of performance and display, extend to every kind of copyrighted work . . . [i]nfringement takes place when any one of the rights is violated." H.R. Rpt. 94-1476 at 61 (1976) (emphasis added).

⁹⁶ One might add to those the "moral rights" provision regarding works of visual art codified in section 106(A).

⁹⁷ 17 U.S.C. §§ 106(1)-(6). This group of rights is often called the "bundle of rights."

⁹⁸ *Id.* § 106(1).

⁹⁹ *Id.* § 106(3).

explicitly articulating the list of “rights”¹⁰⁰ is not very helpful in our search for interests guaranteed to the public.¹⁰¹

However, side by side with the exclusive rights, the law stipulates their limits. The Copyright Act itself seeks to achieve the celebrated “balance” between property rights and interests of others *via* the institution of statutory exceptions, limitations and defenses spotted throughout the law.¹⁰² Perhaps the most significant one in the fair use doctrine.¹⁰³ The next question cursorily discussed is whether fair use could furnish us with some plausible foundations of a public access right.

Fair use, a common law doctrine which was ultimately codified in Section 107 of the Copyright Act (1976) allows, notwithstanding the exclusive rights in Sections 106-106A, use of copyrighted works for certain purposes such as criticism, comment, news reporting education and research. Section 107 prescribes a four-part test in determining whether the use is fair and therefore not subject to infringement liability¹⁰⁴

As a general matter, the fair use cannot be regarded as a source of statutory rights (to access or otherwise use copyrighted material) in the Hohfeldian sense. The reason is that copyright law does not impose any affirmative, enforceable duty on authors to surrender protected works for fair use purposes.¹⁰⁵ If user B wished to use owner A’s work in order to perform an act that *might*

¹⁰⁰ Section 106 is captioned “Exclusive rights in copyrighted works.” *Id.*

¹⁰¹ It might come as a surprise to some that the exclusive “rights” of owners to “do” (as distinguished from to “authorize”) provided in section 106 of the Copyright Act (i.e., to reproduce, prepare derivative works, distribute etc.) might not be considered *rights* in the strict sense, but mere *privileges* absent of third party’s correlative duty to enable or facilitate reproduction, distribution etc. by owners. For instance, when I buy an original painting from the painter, I still have a duty is not to infringe on his copyright. If I violate my duty and infringe (e.g., engaged in mass-reproduction and distribution for commercial purposes), the painter can invoke his rights stipulated in section 106(1) and 106(3) to stop me. But if the painter needs the painting for purpose of making a derivative work, I don’t have a *duty* to facilitate this wish. *Cf. Frasier v. Adams-Sandler, Inc.*, 94 F.3d 129 (4th Cir. 1996) (dismissing infringement claims against defendant who merely withheld slides from the copyright owners).

¹⁰² By and large, the important limitations, exceptions and defenses are codified in section 107 through section 122 of the Copyright Act.

¹⁰³ Codified in 17 U.S.C. § 107.

¹⁰⁴ The four factors read: “(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.” *Id.*

¹⁰⁵ *See* Johnstone, *supra* n. 66, at 366.

qualify as fair use¹⁰⁶ and A refuses to facilitate such act (e.g., to hand over a copy of the work to B), A is not breaching any duty of his, and therefore, B cannot be said to have a claim-right to make fair use.

Instead, fair use is widely acknowledged by the courts as an affirmative defense to copyright infringement allegations, not as an independent source of legal right to use copyrighted works.¹⁰⁷ Fair use, hence, can be perceived as a limitation on the claim-right of owners, or as a users' privilege. In a fair use situation, user B is privileged to use the work without A's permission, while owner A holds the correlative position of "no-right" to advance infringement action. A court looking into a dispute that involves infringement claims and the fair use defense surveys the "operative facts"¹⁰⁸ surrounding the alleged use, and if the court concludes that the operative facts qualify it as "fair use," A has "no-right" or no enforceable claim under copyright.¹⁰⁹

Put another way, a finding of a general fair use right to access copyright protected works cannot stand because fair use, in principle, is no a valid source to *any* kind of users' Hohfeldian rights by virtue of its nature as a privilege that entails no corresponding duty of owners to abide by.

The curious state of affairs with regard to access in the pre-DMCA reality is that the Copyright Act has never stipulated a *users'* duty not to access copyrighted works without owner's permission, and necessarily, owners did not have a claim-right in copyright to prevent "impermissible" access.¹¹⁰ In addition,

¹⁰⁶ Note that fair use, by its nature, can be usually determined only *ex post*, that is, after the use has taken place. For instance, section 107(4) stipulates the fair use factor that examines the effect of the use upon potential market or value of the copyrighted work, a question that may be difficult to answer *ex ante*. In addition, as an affirmative defense, fair use is an issue during litigation only after the allegedly infringing act has already occurred, unless the matter is brought before a court in the form of a users' motion for a declaratory judgment to approve a certain use, *ex ante*, as permissible. See e.g. *Bruzzone v. Miller Brewing Co.*, 202 U.S.P.Q. 809 (N.D. Cal. 1979).

¹⁰⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (viewing fair use as an affirmative defense) (citing *Harper & Row*, 471 U.S. 539, 561 and H.R. Rpt. 102-836 p.3, n.3 (1992)).

¹⁰⁸ Hohfeld defined "operative facts" as "those which, under the general legal rules that are applicable, suffice to change legal relations, that is, either to create a new relation, or to extinguish an old one, or to perform both of these functions simultaneously." Hohfeld, *supra* n. 67, at 25.

¹⁰⁹ The "operative facts" (sometimes called, as Hohfeld noted, "constitutive," "causal" or "dispositive" facts - to be distinguished from *evidential* facts) in fair use situations giving rise to the statutory fair use privilege are derived from the factors in section 107 of the Copyright Act. 17 U.S.C. § 107.

¹¹⁰ See Efroni, *supra* n. 80, at 278 (where I argue that pre-DMCA access to works used to be "a free sphere within the copyright domain: owners cannot exclusively control [access], and us-

copyright law has never imposed an *owners'* duty to provide, facilitate, allow or otherwise enable access to users for fair use purposes or otherwise.¹¹¹ It seems that the accurate Hohfeldian categorization of the jural relations between an owner and a user regarding *mere access* to copyrighted works is that users were privileged to access works (as long as infringement would not occur in the process), a non-codified privilege that resided *outside* of the realm of the fair use privilege.¹¹²

Chamberlain did not make a clear connection between application of the fair use doctrine and what it called the “inherent legal right” of legitimate purchasers of a product to use embedded software. It referred instead to their authorization to do so that stemmed from “[c]opyright law itself.”¹¹³ More generally, the court clearly spoke in terms of existing “rights that the Copyright Act grants to the public” (i.e., to perform mere access) that may be adversely affected by access control to works.¹¹⁴

Some language suggests a contention between such an “inherent legal right” of a consumer and fair use, at least with regard to the court’s complete

ers cannot always vindicate [it]”); *cf.* Heide, *supra* n. 66, at 366-67 (footnotes omitted) (arguing that although “[i]t is instantly observable that there is no ‘right against the gaining of unauthorised access’ to a copyrighted work . . . it can be said that a copyright owner has the ‘right against the gaining of unauthorized access’ where such access is undertaken for the purpose of engaging in any of the uses reserved to the rights-holder”).

¹¹¹ Professor Ginsburg noted that “the copyright law has neither compelled copyright owners to make a general disclosure of their works, nor traditionally obliged right holders to make their works, once disclosed, available in a way that would facilitate either access or copying, even for fair use purposes. Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 Colum. L. Rev. 1613, 1635 (2001) (footnotes omitted).

¹¹² The statutory fair use privilege covers only activities that *could* be considered a violation of the user’s duties not to reproduce, distribute etc. as stipulated in section 106 (and section 106A) of the Copyright Act. 17 U.S.C. § 107 (2000) (“[n]otwithstanding the provisions in sections 106 and 106A”). Since mere access is not subject to the exclusive right of authors under section 106, the statutory fair use defense under section 107 apparently does not apply to such activity.

¹¹³ “Copyright law itself authorizes the public to make certain uses of copyrighted materials. Consumers who purchase a product containing a copy of embedded software have the inherent legal right to use that copy of the software.” 381 F.3d at 1202.

¹¹⁴ *Id.* at 1200 (“[under Appellant’s proposition] the owners of a work protected by *both* copyright *and* a technological measure that effectively controls access to that work per § 1201(a) would possess *unlimited* rights to hold circumventors liable under § 1201(a) *merely for accessing that work*, even if that access enabled *only* rights that the Copyright Act grants to the public.” (emphasis in original)).

rejection of Appellant's attempts to block *any* opportunity to make fair use by giving a "*per se*" interpretation to the anticircumvention provisions.¹¹⁵

In any case, the court is unequivocal on one critical point: the act of gaining access that has nothing to do with traditional copyright protections/violations, is not actionable under the DMCA, as it is not actionable under any other provision of the Copyright Act. The link between this proposition and some kind of fair use protection against circumvention and trafficking allegations that involve *mere* noninfringing access is evasive, but at the same time retains an inescapable prominence throughout the decision.¹¹⁶

4. The Post-DMCA Level

On the third level, the post-DMCA Copyright Act seems to do precisely the opposite of supporting a rule of a public access "right" to copyrighted content.¹¹⁷ In turn, a doctrinal treatment of the issue renders valid questions about the nature of entitlements granted to owners *via* the anticircumvention rules unavoidable. On numerous occasions, *Chamberlain* makes it perfectly plain that the DMCA *did not establish an owners' new exclusive right to control access independent of traditional copyright protections.*¹¹⁸ Does this determination merely state the obvious?

The anticircumvention provisions define certain behaviors regarding works which, from the time the law becomes effective, shall be unlawful – in

¹¹⁵ *Id.* at 1202 ("Chamberlain's proposed construction would allow copyright owners to prohibit *exclusively fair* uses even in the absence of any feared foul use. It would therefore allow any copyright owner, through a combination of contractual terms and technological measures, to repeal the fair use doctrine with respect to an individual copyrighted work--or even selected copies of that copyrighted work. Again, this implication contradicts § 1201(c)(1) directly." (emphasis in original)).

¹¹⁶ See further discussion, *infra* Part IV(B).

¹¹⁷ A review of the list of statutory anti-circumvention exceptions in section 1201 reveals no trace of "right-claims" granted to their beneficiaries ensuring the enforcement of those particular access-privileges in the sense that owners who employ TPMs are *obligated* to furnish access to the beneficiaries. In Europe the attitude on this point is different. *See*, Council Directive 2001/29, 2001 O.J. (L 167), art. 6(4)(para. 1-2) (instructing member states as to the promulgation in domestic laws causes of actions against TPMs installers that refuse to voluntarily respect certain domestically codified anti-circumvention exceptions); §95(b)(1)(2) of the German Copyright Act (Urheberrechtsgesetz) (implementing the foregoing Directive and creating a *duty* of TPMs installers to provide the means to access digitally-locked works in certain circumstances.)

¹¹⁸ *See e.g.*, *Chamberlain* at 1192 ("[t]he essence of the DMCA's anticircumvention provisions is that §§ 1201(a),(b) establish causes of action for liability. They do not establish a new property right.")

particular, the act of circumvention an effective technological measure that controls access and related trafficking.¹¹⁹ Thus, acts that hitherto were not a matter of copyright law become subject to an exclusive entitlement of copyright holders to enjoin them. For example, a person who challenges the new prohibitions by performing an act of gaining unauthorized access (that is, disabling digital access controls employed by owners) is risking in draconian civil sanction,¹²⁰ and if acting willfully, the challenger may endure severe criminal consequences.¹²¹ The law does not conflate liability under the anticircumvention provision with the requirement that the technological measure effectively *protects a right* of a copyright owner under the Copyright Act.¹²²

To be sure, the DMCA anticircumvention provision does not contain language that explicitly outlaws unauthorized access to works. The legal entitlement of owner to enforce access control vis-à-vis “digital intruders” is conditioned with the employment of effective TPMs, and the circumvention thereof. From the perspective of an access-seeking user, however, there is no practical difference between direct and indirect legal enforceability of the entitlement to control digital access. Even had Congress championed a law providing that copyright owners shall have the right to control/prohibit access to their digitized works,¹²³ owners would have certainly needed to be able to police, detect and

¹¹⁹ 17 U.S.C. §§ 1201(a)(1)(A), (a)(2).

¹²⁰ 17 U.S.C. § 1203. Section 1203(c)(3)(A) titled “statutory damages” awards up to US\$ 2,500 “per act of circumvention, device, product, component, offer, or performance of service, as the court considers just.” *Id.*

¹²¹ 17 U.S.C. § 1204. According to this provision, a willful violator of section 1201 for commercial purposes should expect up to US\$ 500,000 fine, or up to five years in prison, *or both*, for the first offense. For a subsequent offense the maximum fine and jail time are doubled.

¹²² Compare 17 U.S.C. §§ 1201(b)(1)(A)-(C) (the additional violation provision addressing “copy control” measures) with 17 U.S.C. §§ 1201(a)(3)(A)-(B) (defining unlawful circumvention and effective technological measure in the meaning of the anticircumvention and the anti-trafficking provisions).

¹²³ See *Universal City Studios Inc. v. Corley*, 273 F.3d 429, 435 (2d Cir. 2001); Note that nothing in the language of the DMCA limits the application of the anticircumvention provisions to “digital” or “digitized” copyrighted works. However, although section 1201(a) merely speaks of “works protected under this title,” the legislative history indicates that the idea was to encourage and protect authors wishing to distribute their works in digital forms, primarily over the Internet. See H.R. Rpt. 105-55 pt. 2 at 9 (July 22, 1998) (emphasizing the need to grant legal protection to digital protection measures that play crucial role in safeguarding interests of owners and users of works in digital form); H.R. Rpt. 105-551, pt. 1 at 17 (May 22, 1998) (referring to the new access right as the “*electronic* equivalent of breaking into a locked room in order to obtain a copy of a book” (emphasis added)); Sen. Rpt. 105-190 at 8 (May 11, 1998) (explaining the need to implement the WIPO treaties in light of advances digital technology and the need to protect works in digital format).

limit unauthorized access *via* technological means. Owners who are not interested in limiting access would probably not employ TPMs in the first place.

The act of circumvention in order to gain access to works is qualitatively distinguished from any other act that owners were traditionally able to prohibit or authorize. In practical terms, section 1201(a) added a new weapon to the arsenal of right holders in a form of expanding the scope of prohibited behaviors beyond those articulated in Section 106 of the Copyright Act. Commentators widely acknowledged the fact that the circumvention prohibition had created, *de facto*, a new exclusive "right" within copyright domain to control access to digitized works.¹²⁴

Early on, during the legislative process of the DMCA, the proposal of the House Commerce Committee to enact a "free standing" circumvention prohibition external to the Copyright Act has been rejected.¹²⁵ The new Chapter 12 incorporated into Title 17 established a statutory right of copyright owners to control access to digital works that are protected by technological protection measures,¹²⁶ subject to certain, narrowly defined, particular exceptions.¹²⁷ The legislative history of the DMCA further refers to the anticircumvention ban as a new "right" secured to owners, a right that stands independent of copyright infringement liability:

Although sections 1201(a)(2) and 1201(b) of the bill are worded similarly and employ similar tests, they are designed to protect two distinct *rights* and to

¹²⁴ Some examples follow: Professor Ginsburg supports anticircumvention laws (that establish a right to control access) since "[t]he evolution of an access right is consistent with . . . earlier examples of Congressional response to emerging modes of exploitation of copyrighted works." Jane C. Ginsburg, *Essay: From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, 50 J. Copy. Socy. 113, 124 (2003); see also Laura N. Gasaway, *The New Access Right and its Impact on Libraries and Library Users*, 10 J. Intell. Prop. L. 269, 282 (2003) ("[t]he language of the statute itself does not mention a right of access per se; instead, in U.S. law, technological access controls are protected by the statute. There is no right to control access absent the use of technological protection measures implemented by the copyright holder to control access. So, an access right must flow from this, and indeed this appears to be the case.") (footnote omitted); Kamiel J. Koelman, *A Hard Nut to Crack: The Protection of Technological Measures*, 22 Eur. Intell. Prop. Rev. 272, 278 (2000) (concluding that the U.S. legislature has created a novel "right of access to technologically protected works").

¹²⁵ H.R. Rpt. 105-551 pt. 2 at 23-24 (May 2, 1998) (the proposal of the House Commerce Committee to enact an independent access control prohibition external to Title 17 U.S.C.); Nimmer, *supra* n. 24, at 684 n.54 (referring to the House Commerce Committee Report, H.R. Rpt. 105-551 pt. 2, and pointing out that the Commerce Committee's call for free standing anticircumvention legislation had failed).

¹²⁶ *Supra* n. 124.

¹²⁷ *Supra* nn. 24-28 and accompanying text.

target two distinct classes of devices. Subsection 1201(a)(2) is designed to protect *access* to a copyrighted work. Section 1201(b) is designed to protect the *traditional copyright rights of the copyright owner*. As a consequence, subsection 1201(a)(2) prohibits devices primarily designed to circumvent effective technological measures that limit access to a work. Subsection 1201(b), on the other hand, prohibits devices primarily designed to circumvent effective technological protection measures that limit the ability of the copyrighted work to be copied, or otherwise protect the copyright rights of the owner of the copyrighted work. *The two sections are not interchangeable*, and many devices will be subject to challenge only under one of the subsections.¹²⁸

The above passage provides a strong indication that the legislative intent was to create a new “right” to control/prohibit access to digital works protected by TPMs.¹²⁹ This “right” was supplemented by a prohibition on trafficking in devices that are able to defeat digital locks to copyright content.¹³⁰

Chamberlain had it differently. Clearly, recognizing a property right to control access, and by doing so acknowledging liability that is completely independent from infringement, would directly conflict with the court’s theory about the necessary “reasonable relationship” between access and copyright “protection.” Indeed, *Chamberlain* had valid policy reasons to object a sheer severance of circumvention liability from traditional copyright law and its built-in limitations.¹³¹ But this is a *policy* matter, to be distinguished from a “technical” application of a given law to a given fact-situation and determining legal positions *as stipulated in the law*.

Hohfeld might label our entire foregoing analysis that would support the establishment of a new owners’ right to control access a blunt manifestation of

¹²⁸ Sen. Rpt. 105-190, at 12 (emphasis added).

¹²⁹ The Committee in the above quotation stressed the distinction between two new “trafficking” prohibitions, the one articulated by section 1201(a)(2) (the anti-trafficking provision) and the one in section 1201(b) (the additional violations provision). *Id.* The Congressional choice of vocabulary strongly indicates that the anti-trafficking provision was meant to further support owner’s new *right*, namely, the right to prohibit/control access pronounced in section 1201(a)(1)(A) (the anticircumvention provision).

¹³⁰ In addition to the right to control access, Professor Dan Burk argues that the anti-trafficking prohibitions grant a new ancillary property right in circumvention technologies themselves. See Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. Rev. 1095, 1109 (2003).

¹³¹ The court mentioned five main arguments, some of them reflect plain policy considerations, against a *per se* reading of the anticircumvention prohibitions: (1) irrationality, (2) conflict with the Savings Clause (Section 1201(c)(1)), (3) absurd and disastrous results, (4) aversive and impermissible effect on the doctrine of copyright misuse and antitrust laws, and (5) potentially banning “exclusively fair” uses. 381 F.3d at 1200-1202.

"the principle of linguistic contamination."¹³² So, remaining loyal to the quest of providing a systematic and clear analysis, we are obligated to sharpen the argument whilst applying the Hohfeldian model of jural relations.

As suggested earlier, we can view the pre-DMCA positions of owners and users regarding access to copyrighted works as involving two separate, but potentially conflicted privileges. *Under copyright law*, users enjoyed a privilege to access works as long as such access would not involve infringing acts,¹³³ while owners enjoyed a privilege to prevent unauthorized access to their work, and in the relevant circumstances, by employing TPMs for this purpose.¹³⁴

Exactly the same privileges can be analyzed from the perspective of their Hohfeldian "mirror image" (i.e., their opposites). Users had no claim-right under copyright to access works without permission and therefore owners had no correlative legal duty to provide them with such access. Having no obligation not to interfere with users' access privilege, one possible way to interfere retained by owners was to employ TPMs that practically enforced access control.

As often mentioned, no technological protection measure is absolutely foolproof from third parties' interruptions with its access/use control functions, interruption that the DMCA's calls "circumvention."¹³⁵ In Hohfeldian terms, a circumventor of technological measures who tampers with the function of the measures and gains access anyway, is thus interfering with the owner's *privilege* to employ such measures. By definition, since the owner's entitlement to put in place TPMs for purpose of effectuating access control was mere privilege, the

¹³² Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 710, 716 (1917).

¹³³ Of course, this privilege may be limited by owners' rights that would stem from completely different legal disciplines and distinguishable jural relations, such as the owners' right to prevent trespass to land or chattels, where physical copies of works are kept.

¹³⁴ Again, such an owner's privilege could be potentially limited by a separate interest of a user that would involve a distinguishable set of legal relations, for instance, when the owner has a contractual obligation (i.e., a "duty") to enable access.

¹³⁵ As the House Judiciary Committee observed, "When copyrighted material is adequately protected in the digital environment, a plethora of works will be distributed and performed over the Internet. In order to protect the owner, copyrighted works will most likely be encrypted and made available to consumers once payment is made for access to a copy of the work. There will be those who will try to profit from the works of others by decoding the encrypted codes protecting copyrighted works, or engaging in the business of providing devices or services to enable others to do so." H.R. Rpt. 105-551 pt. 1 at 10 (May 22, 1998); *see also* June M. Besek, *Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts*, 27 Colum.-VLA J.L. & Arts 385, 392 (2004) (noting that international recognition in the vulnerability of TPMs motivated lawmakers in the international and national levels to back such measures with legal protection).

owner had no cause of action *under copyright* (i.e., no enforceable “claim”) against a circumventor who achieved mere access.

The legal reality in copyright – increasingly influenced by the technological reality revolutionizing the ways works are being created, embodied, marketed and disseminated - has set the stage for a magic circle of conflicting privileges; the access privilege of users was abridged by TPMs, while owners’ privilege to employ TPMs was interfered with by users’ privilege to crack them with circumvention technology. In the midst of this confusion, Hohfeld provides us with a useful clue how to solve the problem: “It is . . . clear . . . that . . . a privilege or liberty to deal with others at will might very conceivably exist without any peculiar concomitant rights against ‘third parties’ as regards certain kinds of interference. Whether there should be such concomitant rights (or claims) is ultimately a question of *justice and policy*.”¹³⁶

This is exactly what Congress did in enacting the anticircumvention rules. Congress created a legally protected interest to enforce one privilege; the privilege of owners that from now on will have the upper hand. The privileges of users to access and to hack TPMs were subordinated to (or, largely abolished by) the owners’ interest to block access. But what is the nature of this interest? Hohfeld comes to the rescue again, and the buzzword is “control” which indicates Hohfeldian “*power*.”¹³⁷

A situation of power/liability, as distinguished from right/duty and from privilege/no-right, is dynamic rather than static.¹³⁸ We must therefore observe the jural relations before and after the power holder has actually exercised his power.

Post-DMCA, a power was vested in owners. Access-seeking users, holding the stick at the other end (i.e., having the Hohfeldian correlative quantity), are in a position of “liability.” That means that they are now susceptible to the volitional capability of the power-holder to change their legal position regarding access to works, namely, from an access privilege to a duty not to access without permission. The volitional act of owners exercising their power is

¹³⁶ Hohfeld, *supra* n. 67, at 36 (emphasis added).

¹³⁷ *Supra* nn. 75-79 and accompanying text; *cf.* Heide, *supra* n. 66, at 365 (arguing that “[a]s the ability to order, limit, instruct, or rule something or someone’s actions or behaviour is inherent to the definition of ‘control,’ what is in issue with the ‘access-right’ is not only the ability to grant or authorise initial access but also repeated acts of access, not only for a general purpose but also for specific ones. Principally, this involves changing the legal relationship between the copyright holder and user from one where access is not authorised to one where it is. Accordingly, what is in issue is a ‘power’ and not a “right.”).

¹³⁸ Nyquist, *supra* n. 65, at 241 (pointing out that power/liability and immunity/disability relations focus “both on a current state of affairs and a potential future state”).

the act of employing TPMs.¹³⁹ Such act largely constitutes the “operating facts” that must be considered when evaluating the corresponding legal positions. From that moment on, the privilege of users to access works is abolished and replaced with the duty not to interrupt with the function of those TPMs, which, as argued earlier, is the practical equivalent of the abolishment of their privilege to access such works free from legal (copyright) consequences.

The crux of the matter is, of course, that in order to have the power to change users’ position from a privilege to a duty, *owners must have been granted the conditional claim-right to totally or partially block unapproved access to their works.*¹⁴⁰ More pointedly, if private party A is *legally* entitled to destroy a privilege of private party B to do X and replace it with a duty owed by B to A not to do X, A must have an imbedded *right* to exclude B from doing X.¹⁴¹ A similar analysis can be performed, *mutatis mutandis*, with respect to the new liability of trafficker in devices and technologies that can be used by circumventors to defeat TPMs, which was the real issue in *Chamberlain*.¹⁴²

Chamberlain rightfully emphasized that the “distinction between property and liability is critical.”¹⁴³ The court continued: “Whereas copyrights, like patents, are property, liability protection from unauthorized circumvention merely creates a new cause of action under which a defendant may be liable. The distinction between property and liability goes straight to the issue of authorization.”¹⁴⁴ The court concluded that “[t]he anticircumvention provisions convey no additional property rights in and of themselves; they simply provide property owners with new ways to secure their property.”¹⁴⁵

¹³⁹ Such TPMs must, of course, fall under the legal definition of section 1201(a)(3)(B) in order to effectively alter the relevant legal positions.

¹⁴⁰ With the adjective “conditional” it is meant to point out that the claim-right to exclusively control access, as distinguished from section 106 rights, does not subsist automatically with regard to every work that is eligible copyright protection. Pursuant to international copyright law, domestic formalities can no longer constitute a bar to copyright protections. *See* Art. 5(2) of the Berne Convention for the Protection of Literary and Artistic Works, *opened for signature* Sept. 9, 1886, art. 1-2, S. Treaty Doc. No. 99-27 (1986), 828 U.N.T.S. 221, 225, 227 (last revised at Paris, July 24, 1971, amended 1979). Accordingly, section 102 of the Copyright Act grants federal copyright protection to original works of authorship “fixed in any tangible medium of expression,” without more.. This reflects one of the doctrinal differences between the access right and traditional copyrights.

¹⁴¹ *But see* cautionary comment provided in note [77-78] *supra*.

¹⁴² 381 F.3d at 1192.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1192-93.

¹⁴⁵ *Id.* at 1193-94.

In the above excerpts, *Chamberlain* uses four key legal terms: property, liability, authorization and cause of action, though the meaning of those terms remained somewhat uncertain. With “property,” the court might be referring to the enforceable bundle of legal interests such as claim-rights, privileges, powers etc. that are typically afforded to copyright and patent owners.¹⁴⁶ The court further seems to recognize that the anticircumvention law *did* create users’ “liability,” correlated with owners’ new powers (in the court’s and the statute’s terms - “authorization”).

However, a difficulty may arise regarding the court’s usage of the term “liability” since liability (or being “subject to liability”) can have a different meaning in legal fields other than property (exemplified in tort law). According to the terminology of the Restatement (First) of Torts, “subject to liability” denotes the fact that “the actor’s conduct is such as to make him liable for another’s injury, if (a) the actor’s conduct is a *legal cause* thereof, and (b) the other has not, by his own misconduct, so contributed to his injury as to disable him from bringing an action.”¹⁴⁷

In turn, “legal cause” in torts denotes the fact that “the manner in which the actor’s tortious conduct has resulted in *an invasion of some legally protected interest of another* is such that the law regards it just to hold the actor responsible for such harm.”¹⁴⁸ What are those “legally protected interests?” Where should we look for them?

In a similar vein, there is a fundamental difference between the usage of the term “duty” in tort law, compared to its usage in property law. A breach of duty in torts does not automatically create a legally enforceable claim, whereas in property, the very definition of duty indicates that a breach thereof would give rise to a claim.¹⁴⁹ For example, in the context of ordinary negligence, a mere breach of the duty of care without more will not suffice to establish liability in torts.¹⁵⁰

¹⁴⁶ See e.g. *Restatement (First) of Property* § 5 (1936) (“[t]he word ‘interest’ is used in this Restatement both generically to include varying aggregates of rights, privileges, powers and immunities and distributively to mean any one of them.”).

¹⁴⁷ *Restatement (First) of Torts* § 5 (1934) (emphasis added).

¹⁴⁸ *Restatement (First) of Torts* § 9 (1934) (emphasis added).

¹⁴⁹ The Restatement of Property explains that throughout all the Restatements (except the Restatement of Torts) the word “duty” is used as the correlative of “right.” In torts, however, a breach of one’s duty to conduct himself according to a legal standard at the risk that by deviating from this standard he may become liable to another does not necessarily make the actor liable. *Restatement (First) of Property* § 1 cmt. a, illus. 1 (1936)

¹⁵⁰ The elements of a cause of action in negligence typically combine a four-part inquiry of the actor’s (1) duty; (2) a breach thereof; (3) proximate cause and; (4) actual harm. See, *Prosser*

The purpose of the above comparison between legal concepts as used in property and tort law is to emphasize that the “legally protected interests” – upon which ground a wrongdoer may be subjected to liability under the DMCA – are formulated and defined within the realm of (intellectual) property law, and in this case in copyright law. That means that the common understanding of the terms “right,” “duty” or “liability” in the DMCA context should correspond their pertinent property meaning.

It follows that Congress, in drafting the DMCA anticircumvention laws, was engaged in formulating and defining property interests.¹⁵¹ Doing so, Congress has exercised the power vested upon it by the Copyright Clause to fine-tune the copyright system in order to reflect the balance between owner and the public that effectuate the copyright policy it endeavored to pursue.¹⁵²

How can *Chamberlain's* “no new property rights” approach be consolidated with the Hohfeldian analysis that would warrant the granting of a right-claim to owners, embodied in their power to thwart public access privilege and make unauthorized access actionable? A solution perhaps lay in the *definition* of the new power granted to owners. More specifically, one can argue that the powers conferred upon copyright owners by the anticircumvention laws are limited (or tied) to circumstances where exercising the public access privilege would result in (or have a “reasonable relationship” to) infringement.

and Keeton on Torts, W. Page Keeton et. al. (Eds.), 5th. Ed. (West Pls'g Co., 1984) §30 at 164-65; *See also*, 2 *The Law of Torts*, Fowler V. Harper & Fleming James Jr. (Little Brown and Co. 1956) §18(1) at 1015 (“breach of the standard [of conduct required by the law] by a defendant is not always attended by liability.”)

¹⁵¹ Note that section 1203 of the Copyright Act empowers the courts to grant temporary and permanent *injunctions* in favor of copyright owners. 17 U.S.C. § 1203(b)(1) (2000). The remedy of injunctions is usually the chief (civil) consequence of the violation of private property interests (“property rule”), unless public utility would favor a shift to “liability rule” (i.e., allowing a nonconsensual invasion to property interests as long as compensation is rendered.) *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972). Calabresi and Melamed explained: “An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.” *Id.* at 1092. “In our framework, much of what is generally called private property can be viewed as an entitlement which is protected by a property rule. No one can take the entitlement to private property from the holder unless the holder sells it willingly and at the price at which he subjectively values the property.” *Id.* at 1105. In short, the possibility of injunction against unlawful circumvention/trafficking indicates not only that unlawful access is treated as a (new) property entitlement, but also that the entitlement is such a “strong” one that mere compensation for unlawful access cannot fully protect proprietors’ interests.

¹⁵² *Supra* n. 102.

Note, however, that even if one reads the anticircumvention powers narrowly, those powers must encompass a *new* (correspondingly-narrow) right-claim to prevent “trespass” to works since such entitlement was never part of copyright law.¹⁵³ In any event, *Chamberlain*’s “no new property rights” doctrine manifests a ruling that involves (re)definition of the property positions of users and owners in copyright with respect to access. This process of defining legally enforceable property positions is nothing else but setting out copyright policy.

Hohfeld stressed that granting a party the legal entitlement to enforce his privilege is “ultimately a question of justice and policy; *and it should be considered, as such, on its merits.*”¹⁵⁴ Nonetheless, *Chamberlain* presents its “no new property rights” approach as if it were merely reiterating the original intent and language of the anticircumvention provisions.¹⁵⁵ In fact, in repetitiously upholding this proposition, *Chamberlain* is establishing a significant precedent, one that is mirroring policy consideration rather than sheer application of Congress’s choice as reflected in the law.

The argument is that the contradiction between the court’s interpretational theory and the definitions of the legal positions, as stipulated in the statute, is evident. If users are liable, it necessarily follows that owners have the power to change users’ legal position from a privilege to a duty. Owners employing TPMs must be holding a claim-right against users who, correlatively, have the duty not to circumvent them.

To conclude, the two basic stipulations supporting *Chamberlain*’s theory should be understood as mirroring copyright policy pursued by the court regarding the proper balance of interests in the case of access to copyrighted works. As we have seen, the first stipulation of “no new property rights,” in Hohfeldian terms, creates a logical incompatibility, while the second stipulation, at best, may be referring to the non-statutory users’ privilege to access works, one that now can be practically and legally abridged by employing TPMs.

¹⁵³ *Supra* n. 110 and accompanying text. In other words, an enforceable duty not to circumvent without a correlative right to prohibit circumvention is a creature unbeknownst to the Hohfeldian model.

¹⁵⁴ Hohfeld, *supra* n. 67, at 36 (emphasis added).

¹⁵⁵ *Chamberlain*, 381 F.3d at 1195 (stating “we must construe the full boundaries of anticircumvention and anti-trafficking liability under the DMCA. We must determine the Congressional intent embodied in the statute’s language, and then enforce the correctly construed statute to the facts at hand.”); *Id.* at 1203 (“Congress attempted to balance the legitimate interests of copyright owners with those of consumers of copyrighted products The courts must adhere to the language that Congress enacted to determine how it attempted to achieve that balance.” (citation omitted)).

B. Fair Use and the Anticircumvention Regulation

One of the most controversial issues related to the anticircumvention laws in the U.S. is the applicability of fair use as a defense against unlawful circumvention and trafficking claims. The question is whether unauthorized circumvention of technological protection measures that are put in place in order to control access to a digital work is immune¹⁵⁶ from DMCA liability as long as such access is gained in order to make fair use of the work. The legislative history of the DMCA indicates that this was indeed a significant topic on the legislature's agenda, and that some members of Congress were deeply concerned that anticircumvention bans would allow right holders to block any fair use of their works simply by blocking access thereto.¹⁵⁷

A proposal to enact a general exception devoted to exempt circumventions and trafficking for legitimate purposes such as fair use was flatly rejected.¹⁵⁸ Instead, Congress resolved to address the issue principally by employing three types of instruments. First, Section 1201(a)(1)(B)-(D) created the institution of an ongoing Rulemaking Process,¹⁵⁹ devising in the Librarian of Congress the regulatory power to create periodical exceptions from anticircumvention liability (not trafficking) in favor of users whose ability to make noninfringing uses of a particular class of works is adversely affected by virtue of the anticircumvention prohibition.¹⁶⁰

Second, Congress enacted Section 1201(c)(1) (the Savings Clause), which ensures that nothing in the anticircumvention scheme "shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use [as provided under the Copyright Act.]"¹⁶¹ Third, the DMCA stipulated a line of

¹⁵⁶ Hohfeld explained that while "power is one's affirmative 'control' over a given legal relation as against another . . . an immunity is one's freedom from the legal power or 'control' of another as regards some legal relation." Hohfeld, *supra* n. 67, at 55. Therefore, when we ask whether fair use can protect users' interests while accessing works in no-infringement situations we basically ask whether users are immune from owners' power to abolish their access privilege.

¹⁵⁷ See H.R. Rpt. 105-551 pt. 2 at 25-26 (July 22, 1998) (voicing concern over the influence of the anticircumvention bans on the balance in copyright law achieved through the fair use doctrine).

¹⁵⁸ *Id.* at 86 (House Commerce Committee rejected a proposal to enact "an equivalent fair use defense for the new right to control access.").

¹⁵⁹ 17 U.S.C. § 1201(a)(1)(B)-(D) (2000).

¹⁶⁰ *Supra* n. 25.

¹⁶¹ 17 U.S.C. § 1201(c)(1).

special statutory exceptions that pointedly relate to various bans and allowing certain activities in certain circumstances.¹⁶²

The problem consistently arising whenever the applicability of the fair use doctrine as a defense to anticircumvention violations emanates primarily from the following factors: (1) fair use is an affirmative defense against *copy-right infringement*¹⁶³ (2) violations of the anticircumvention law are *not* infringement¹⁶⁴ (3) there is no explicit statutory equivalent to the fair use defense within the anticircumvention laws.¹⁶⁵

A line of federal cases, most pointedly *Reimerdes*,¹⁶⁶ clearly established that the fair use doctrine is not an available defense against circumvention and trafficking violations outlawed in the DMCA.¹⁶⁷ The Second Circuit in *Corley*, affirming *Reimerdes*, refused to read the Savings Clause as importing the fair use defense into unlawful trafficking allegations even if the device at issue allows fair use in copyrighted material.¹⁶⁸

This issue, especially the scope of the Savings Clause, is subject to sharp controversy among commentators. Professor David Nimmer, like *Reimerdes*, argued that general fair use is wholly inapplicable to DMCA anticircumvention violations.¹⁶⁹ Professor Samuelson contended that courts should distinguish between circumvention aimed at gaining unauthorized access and

¹⁶² 17 U.S.C. § 1201(d)-(j).

¹⁶³ *Supra* n. 107 and accompanying text.

¹⁶⁴ *Chamberlain*, 381 F.3d at 1192.

¹⁶⁵ Representatives Klug and Boucher have proposed to legislate "an equivalent fair use defense for the new right to control access" – a proposal that was rejected by the Committee. *See* H.R. Rpt. 105-551, pt. 2 at 86.

¹⁶⁶ *See Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), *aff'd sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

¹⁶⁷ *Id.* at 323-34. ("The question here is whether the possibility of noninfringing fair use by someone who gains access to a protected copyrighted work through a circumvention technology distributed by the defendants saves the defendants from liability under Section 1201. But nothing in Section 1201 so suggests.")

¹⁶⁸ *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001). *See also 321 Studios v. MGM Studios, Inc.*, 307 F.Supp 2d. 1085, 1104 (N.D. Cal. 2004) (unpublished) (the court held that defendant in a Section 1201(a)(2) action who supplied DVD copying software is culpable despite possible fair use of the software) (citing *Corley* at 459); *Paramount Pictures Corp. v. 321 Studios*, No. 03-CV-8970 (RO) (S.D.N.Y. Mar. 3, 2004) (supported the outcome reached by the Northern District Court of California and granted an injunction in favor of Plaintiffs, the film studios).

¹⁶⁹ "[T]here 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." Nimmer, *supra* n. 24, at 723.

circumventions aimed at making noninfringing use of a lawfully obtained copy of a work.¹⁷⁰ In the later case, the Savings Clause should apply.¹⁷¹ Highlighting a different nuance, Professor Ginsburg offered a possible reading of the Savings Clause that would allow fair use for Section 1201(a) violations, provided that “one concludes that fair use is not merely a statutory rule expressed in § 107 of the Copyright Act, but that it is a general judge-made rule applicable to rights within the penumbra of copyright, as well as to other intellectual property rights, including trademarks.”¹⁷²

What was *Chamberlain*'s position at this juncture? The decision lacks a systematic analysis of the relationship between fair use and Section 1201(a). *Chamberlain* proceeded in a manner resembling Ginsburg's suggestion, yet avoiding a discussion about the general implication of its interpretation. Instead, it employed the theoretical model consisting of the two stipulations noted earlier.¹⁷³ This model would leave with the courts the discretion to exempt certain circumvention and trafficking activities from DMCA liability in cases where the alleged use is found “exclusively fair.”¹⁷⁴ That may mean that gaining access that, by its nature, does not (or *cannot*) facilitate or result in copyright infringement shall be excused. The same should hold true concerning related activities of trafficking in devices that enable such access.¹⁷⁵

There are two possible ways to read the court's fair use approach. On the one hand, *Chamberlain* insists that trafficking in devices that enable use

¹⁷⁰ See Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 Berkeley Tech. L.J. 519, 539-40 (1999).

¹⁷¹ *Id.* The problem remains viable in cases where both tests, which are not mutually exclusive, are met; Access may remain technologically restricted and unauthorized with regards a copy of a work that was lawfully acquired of which the circumventor is aiming at making noninfringing use.

¹⁷² See Jane C. Ginsburg, *Copyright Use and Excuse on the Internet*, 24 Colum-VLA J.L. & Arts 1, 8-9 (2000).

¹⁷³ *Supra* nn. 58-59 and accompanying text.

¹⁷⁴ *Chamberlain* at 1202.

¹⁷⁵ *Id.* at 1204 (“*Chamberlain* neither alleged copyright infringement *nor* explained how the access provided by the Model 39 transmitter facilitates the infringement of any right that the Copyright Act protects. There can therefore be no reasonable relationship between the access that homeowners gain to Chamberlain's copyrighted software when using Skylink's Model 39 transmitter and the protections that the Copyright Act grants to Chamberlain. The Copyright Act authorized Chamberlain's customers to use the copy of Chamberlain's copyrighted software embedded in the GDOs that they purchased. Chamberlain's customers are therefore immune from § 1201(a)(1) circumvention liability. In the absence of allegations of either copyright infringement or § 1201(a)(1) circumvention, Skylink cannot be liable for § 1201(a)(2) trafficking.”) (emphasis in original).

that is “exclusively fair” shall not be subject to the anti-trafficking ban.¹⁷⁶ As mentioned, the court halted there and avoided a more explicit and straightforward statement that would uphold fair use as a general defense against accusations of trafficking in technologies and devices that potentially enable both infringing and noninfringing uses. On the other hand, the court refused to foreclose application of the Savings Clause to Section 1201(a) violations.¹⁷⁷ By doing so, and by establishing the mandatory linkage between access and traditional protection against copyright infringement, the court seems to allow defendants to build a bridge that would leverage fair use safeguards into the anticircumvention prohibitions.

A careful reading of *Chamberlain* indicates a rhetoric which favors judicial receptiveness to fair use consideration when circumstances show that circumvention or trafficking was performed to enable fair use of a work protected by technological measures. This conclusion is particularly plausible in light of the court’s closing statement that summarizes the scope of the anticircumvention laws regarding access control:

A copyright owner seeking to impose liability on an accused *circumventor* must demonstrate a *reasonable relationship* between the circumvention at issue and *a use relating to a property right for which the Copyright Act permits the copyright owner to withhold authorization* ... A copyright owner seeking to impose liability on an accused *trafficker* must demonstrate that the trafficker's device enables *either copyright infringement or a prohibited circumvention*.¹⁷⁸

The operation of this determination substantially turns on the interpretation that is given to the phrase “use relating to a property right *for which the Copyright Act permits the copyright owner to withhold authorization*.” Since, so the court, the anticircumvention regulation did not create new property rights, and since fair use activities *are not subject to the entitlement of copyright owners to “withhold authorization”* where any of the traditional rights is at issue, the conclusion may be that the anticircumvention provision cannot curtail such fair use activities. As to the anti-trafficking provision, neither copyright infringement nor “prohibited circumvention” (according to the foregoing interpretation of the term) occur in a fair use situation and therefore, section 1201(a)(2) may be inapplicable.

¹⁷⁶ *Id.* at 1202.

¹⁷⁷ *Id.* at 1200.

¹⁷⁸ *Id.* at 1204 (emphasis added).

The court seems to suggest that in trafficking allegations, fair uses that are potentially facilitated by the accused device will not necessarily destroy plaintiff's *prima facie* case. But once the burden of proof is shifted to defendant, the following argument may defeat plaintiff's anti-trafficking allegation: consumers use the device or technology at issue in order to make fair uses (or to make use that, by its nature, *cannot* constitute infringement), in other words, consumers make uses that owners cannot enjoin according to traditional copyright law.

Chamberlain was mindful of the holdings in *Reimerdes* and *Corley* but refrained from directly expressing disagreement. In a footnote, the court observed:

We do not reach the relationship between § 107 fair use and violations of § 1201. The District Court in *Reimerdes* rejected the DeCSS defendants' argument that fair use was a *necessary* defense to § 1201(a) . . . because *any* access enables some fair uses, any act of circumvention would embody its own defense. We leave open the question as to when § 107 might serve as an affirmative defense to a *prima facie* violation of § 1201. For the moment, we note only that though the traditional fair use doctrine of § 107 remains unchanged as a defense to copyright infringement under § 1201(c)(1), circumvention is not infringement.¹⁷⁹

This statement is rather ambiguous. It is hard to conceive how fair use cannot be some kind of a defense shielding from unlawful circumvention liability if showing fair use would potentially negate the very factors that *Chamberlain* identifies as necessary elements of such cause of action. In any event, whether necessary, affirmative or any other defense, it is inescapable that *Chamberlain* advocates for considering fair use as relevant factor in determining liability under Section 1201(a).

Chamberlain's usage of the term "exclusively fair" to describe consumers' use of their GDOs, especially in close proximity to mentioning the viability of the anticircumvention "Savings Clause," might create some confusion. Admittedly, the use made by consumers of Appellee's transmitter in order to operate Appellant's GDOs *cannot*, under any circumstances, amount to copyright infringement.¹⁸⁰ And since copyright infringement cannot be an issue in this particular dispute, so is the fate of the statutory fair use defense to copyright infringement. This reflects, of course, on the defenses available to traffickers. If one is engaged in trafficking technologies or devices that *under no circum-*

¹⁷⁹ *Id.* at 1200 n.14 (emphasis in original) (footnote omitted).

¹⁸⁰ As indicated earlier, consumers' use of the relevant software was limited to pressing a button on the transmitter that would direct the GDO to activate the door. *Supra* Part III. Such activity does not fall under any of the traditional copyrights, and importantly, unlawful reproduction is a non-issue.

stances involve or facilitate infringement, the argument that consumer might make fair use of a work they are now able to access is entirely irrelevant to trafficker's defense.

This explains what could be the real distinction between *Chamberlain* and *Reimerdes*, and in the final analysis, points out to the fact that the statutory fair use doctrine is largely an ineffective cure to the illnesses of the anticircumvention provisions. In *Chamberlain*, as well as in similar disputes that will surely come to litigation in the future, the application of the "Savings Clause" as preserving the statutory fair use defense in anticircumvention/anti-trafficking allegations cannot directly help defendants no matter how generously the statutory fair use defense is applied.¹⁸¹

To summarize, activities that are made possible by gaining unauthorized access can be divided into two categories: those that technically *might* amount to or facilitate copyright infringement (e.g., by making infringement technically possible or when access itself conflates with infringement) and those that *cannot*. As to the former category, *Reimerdes* would dismiss a possible fair use as a defense to circumvention and/or trafficking actions, while *Chamberlain* might be receptive to such arguments, though it did not rule directly on this issue. As of the later, the statutory fair use seems to be of no direct practical relevancy.

But defendants in the second category of cases are not wholly defenseless. *Chamberlain* furnished the first building block to a "fair access" doctrine: when circumvention and trafficking exclusively enable actions that *cannot*, under no circumstances, amount to infringement - no DMCA liability will attach.¹⁸² A spillover of this doctrine to access that *might* facilitate infringement is not to be foreclosed under *Chamberlain*. The challenging question, which is also more likely to be raised in future disputes, is how to fashion a "fair access" doctrine to devices and technologies that facilitate both infringing and noninfringing uses.¹⁸³

¹⁸¹ If the fair use doctrine is considered broader than its statutory codification, however, fair use might still have a relevant role to play in such situations. Cf. Ginsburg, *supra* n. 172 and accompanying text.

¹⁸² Cf. Jane C. Ginsburg, *Essay: From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, 50 J. Copy. Socy. 113, 130 (2003) (discussing in brief a possible development of limitations on the access control right).

¹⁸³ The celebrated "substantial non-infringing use" defense against indirect liability for copyright infringement available to technology makers in line with the *Sony* decision, see, *Sony v. Universal City Studios, Inc.*, 464 U.S. 417, 456, is clearly not available in a "fair access" situation since, as noted, infringement is not circumvention. Compare, however, the similarity between indirect liability doctrines and possible defenses for technology makers in DMCA anti-trafficking allegations. The anti-trafficking provision of the DMCA is no more than codification of an indirect liability for unlawful circumvention. Cf. note 128 *supra* and

Less than a year after *Chamberlain* had been decided, the Federal Circuit in *Storage Technologies v. Custom Hardware* reaffirmed its "fair access" doctrine, and even expanded it.¹⁸⁴ That case involved a dispute between a manufacturer of automated data storage machines [Appellee] and an independent maintenance and repair company [Appellant] that rendered services to purchasers of Appellee's systems. In course of operating the storage system and necessarily also in the process of the maintenance service, some software copyrighted by Appellee was copied to the system's RAM (Random Access Memory).¹⁸⁵

Appellee invoked, *inter alia*, claims of copyright infringement for unauthorized reproduction made by Appellant during its repair/maintenance service as a result of the RAM copying and violation of the anticircumvention provisions. The facts that gave rise to the anticircumvention claims were that while intercepting and interpreting error messages produced by the protected software (the "maintenance code"), Appellant had to override a password protection installed by Appellee that was meant to disallow certain unauthorized reconfiguration of the maintenance code [the "GetKey system."]¹⁸⁶

To its defense, Appellant invoked, *inter alia*, the defenses in section 117(a) and 117(c) of the Copyright Act. Section 117(a) allows owners of a copy of a computer program, notwithstanding section 106's prohibitions, to make or authorize the making of another copy or adaptation of that computer program in certain circumstances.¹⁸⁷ Section 117(c) allows the owner or lessee of a machine to make or authorize the making of a copy of a computer program only for repair and maintenance purposes, provided that the machine lawfully contain an authorized copy of the computed program and provided that the terms in subsections 117(c)(1) and 117(c)(2) are met.¹⁸⁸

For reasons that are not directly relevant to our discussion, the *Storage Tech* court accepted Appellant's arguments and held that application of section 117 could shield it from copyright infringement liability under the circumstances at bar.¹⁸⁹ With regards to the anticircumvention liability, *Storage Tech*

accompanying text. The philosophy of *Sony* could surly assist courts in their efforts to articulate a safe platform for technology makers fearing section 1201(a)(2) consequences.

¹⁸⁴ *Storage Tech. Corp. v. Custom Hardware Engr.*, 2005 WL 2030281 (Fed. Cir. 2005).

¹⁸⁵ *Id.* at *1.

¹⁸⁶ *Id.*

¹⁸⁷ 17 U.S.C. § 117(a).

¹⁸⁸ *Id.* at § 117(c).

¹⁸⁹ *Storage Tech.*, at *3-*9. The treatment in *Storage Tech* of the exception in section 117 is by no means unimportant. At the practical level, the majority's liberal interpretation of the seemingly restrictive statutory language of this exception, especially the generous reading given to the terms "maintenance" and programs that are "necessary for [the] machine to be

repeated *Chamberlain's* “no new property rights” rule¹⁹⁰ and dismissed Appellee’s allegations on two grounds;

First, based on the conclusion that Appellee is unlikely to succeed on the merits of its copyright infringement claim (due to an available defense in section 117), *Storage Tech* held: “To the extent that [Appellant’s] activities do not constitute copyright infringement or facilitate copyright infringement, [Appellee] is foreclosed from maintaining an action under the DMCA.”¹⁹¹

Second, even if Appellee were able to prove that the automatic copying of the maintenance software to the RAM *did* constitute non-excusable copyright infringement, it still must prove that Appellants circumvention process *facilitated* that infringement.¹⁹² The court continued:

The activation of the maintenance code may violate [Appellee’s] contractual rights vis-à-vis its customers, but those rights are not the rights protected by copyright law. There is simply not a sufficient nexus between the rights protected by copyright law and the circumvention of the GetKey system. A court must look at the threat that the unauthorized circumvention potentially poses in each case to determine if there is a connection between the circumvention and a right protected by the Copyright Act.... In this case, the threat from [Appellant’s] circumvention of GetKey is distinct from the dangers that [Appellee’s] copyright protects against.¹⁹³

In light of *Storage Tech*, two additional and crucial features of the Federal Circuit’s “fair access” doctrine become prominent. First, a valid defense to copyright infringement may destroy a claim under the anticircumvention rules. Such valid defense (other than the one stipulated in section 117) that instantly comes to mind is the fair use defense in section 107. In other words, the court’s analysis does not provide any grounds to distinguish the defense in section 107 (or any other copyright defense/limitation) from the defense in section 117, and by analogy, applicable fair use defense should be able to defeat anticircumvention allegations.

Second, the court provides an additional breath and flexibility to the “fair access” doctrine by holding that even when infringement took place and even when no copyright defense were applicable to excuse such infringement,

activated” in section 117(c) (against the dissenting opinion of Judge Rader) could significantly protect from infringement liability independent maintenance providers that operate on a long-term basis. *Id.* at *4-*6. *Storage Tech's* discussion is meaningful, as it is apparently the first appellate court to review and apply section 117(c). *Id.* at *3.

¹⁹⁰ *Storage Tech.*, at *9.

¹⁹¹ *Id.* at *10 (citation omitted).

¹⁹² *Id.* at *10.

¹⁹³ *Id.* at *10-*11 (citations omitted).

owners may still fail to establish anticircumvention liability unless they can show a "sufficient nexus" between copyright infringement and the circumventing act (i.e., the employment of circumvention devices.)¹⁹⁴

To be sure, "fair access" and fair use are not the same thing and they apply to distinguishable sets of circumstances. The task is now with the courts to develop and articulate a sensible "fair access" doctrine that would balance the grievances to users' interests introduced by the DMCA.¹⁹⁵ In the future, Congress may actively endorse such common law "fair access" approach by legislative act¹⁹⁶ as it previously codified the fair use doctrine,¹⁹⁷ it may alternatively resolve to supercede such judge-made law, modify it or simply let it be. The advantage of this gradual process of building up common law safeguards that would limit the new access right over the crude Congressional legislative product is straightforward; courts are handling the particular, concrete, real-life disputes of today. They do not endeavor to stretch their wisdom over a whole "digital millennium" and the magnitude of their unavoidable errors is likely to be correspondingly modest.

¹⁹⁴ *Id* at *11. The court held that such nexus is missing under the circumstances since in the course of rebooting the system by Appellant, a RAM copying would occur regardless of the GetKey circumvention. The court opined that "[Appellant's] circumvention of GetKey only allows [Appellant] to use portions of the copyrighted software that [Appellee] wished to restrict technologically." *Id* at *10. A revisit to sections 1201(a)(1)(A) (the basic circumvention prohibition) and 1201(a)(3)(A)-(B) (defining "to circumvent technological measure" and "effectively controls access to a work") may raise questions what exactly did the court mean by "only,"- since the anticircumvention laws seem to address and prohibit *precisely* such activity.

¹⁹⁵ Professor Dan Burk suggested applying the common law doctrine of misuse in order to mitigate anticompetitive implication of the anticircumvention law. See Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. Rev. 1095 (2003). *Chamberlain* has explicitly left the door to the misuse defense open. *Chamberlain* at 1201. Misuse, "fair access" and other doctrines external to the anti-circumvention laws and the Copyright Act may simultaneously function to render the effect of DMCA on creative individuals who need access, researchers who need sources, end-users who need information, commercial competitors that need compatibility and society at large - more "equitable."

¹⁹⁶ See e.g., Benefit Authors Without Limiting Advancement of Net Consumer Expectations Act of 2003 ("BALANCE"), H.R. 1066, 108th Cong. (2003) (Introduced Mar. 4, 2003 by Representatives Boucher and Lofgren) (a Bill aimed at amending the Copyright Act to allow certain fair use circumventions.)

¹⁹⁷ See, Melville B. Nimmer, *Copyright Liability For Audio Home Recording: Dispelling The Betamax Myth*, 68 Va. L. Rev. 1505, 1518-23 (1982) (reviewing the codification of the fair use doctrine into the Copyright Act.)

V. CONCLUSION

In reviewing certain anticircumvention issues raised by the *Chamberlain* and the subsequent *Storage Tech* decisions a significant shift in the judicial interpretation of the DMCA can be identified, a shift that may signal a new trend of a more sympathetic treatment rendered by the courts to “circumventors” and “traffickers.” This trend would manifest a greater sensitivity to the interests of those parties in the copyright bargain that seem to have been under-protected by the DMCA.

This article identified two stipulations standing at the baseline of the Federal Circuit’s interpretation of the anticircumvention scheme; for one, there is no new copyright to control access to digital work. For another, copyright law generally protects the default right of the public to have reasonable access to such works, notwithstanding the anticircumvention prohibitions.

The resulting model, incorporating the “reasonable relationship” element into the anticircumvention scheme, may have the following consequences on future litigation: first, defendants are encouraged to vindicate their “right” to access copyrighted works in various scenarios, not necessarily only in the context of lawfully purchased product incorporating embedded works. Second, the “reasonable relationship” element furnishes, in the doctrinal level, the foundation of a “fair access” defense to anticircumvention allegations to be further developed by the courts.

The U.S. Supreme Court refrained from resolving the possible conflict between such “fair access” doctrine and previous caselaw denying circumvention of access controls for fair use purposes as a valid defense to anticircumvention violations.¹⁹⁸ So remains the Federal Circuit’s jurisprudence of “fair ac-

¹⁹⁸ On January 20, 2005 plaintiff filed a Petition for Writ of Certiorari to the U.S. Supreme Court. *See* 125 S.Ct. 1669 (U.S. Mar.21, 2005). Petitioner pleaded for a Supreme Court determination on the following three questions:

1. Does Section 1201(a)(2) of the Digital Millennium Copyright Act (“DMCA”) prevent trafficking in a device that circumvents a technological measure that controls access to embedded copyright-protected software used to operate consumer goods?
2. Does the fair use provision of the Copyright Act authorize circumvention of a technological measure that controls access to embedded copyright-protected software used to operate consumer goods?
3. Does Section 1201(a)(2) of the DMCA require that circumvention of an access control measure, to be actionable, must result in or facilitate infringement of a right granted to the copyright holder by the Copyright Act?

See 2005 WL 190364 (U.S.). In the absence of a national standard, these vexing questions remained, for the time being, opened.

cess," despite its methodological drawbacks as indicated throughout this Article, an important landmark in the DMCA landscape and constitutes a counterweight to aggressive application of the anticircumvention bans in situations that have nothing, or very little, to do with justifiable, reasonable and productive protection to creative expressions under copyright law.