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**CIRCUMVENTING RIGHTS CONTROLS:  
THE TOKEN CRACK IN THE FAIR USE WINDOW LEFT OPEN BY  
CONGRESS IN SECTION 1201 MAY BE OPEN WIDER THAN  
EXPECTED—TECHNICALLY SPEAKING**

Neil J. Conley\*

**Abstract**

This Article discusses why Congress prohibited the circumvention of access controls in section 1201 of the U.S. Copyright Act, but did not prohibit the circumvention of rights controls. This Article shows that the lack of a prohibition against rights control circumvention may have been a token attempt by Congress to allow fair use of copyrighted works to which users had lawful access. In other words, if one has legal access to a work, one can circumvent the rights control measures on that work without violating section 1201. One can then make fair use of the work. In addition, the prevailing thought on section 1201 is that only the person who has legal access to a work may circumvent rights control measures on that work. This Article will discuss some ways that individuals who cannot circumvent rights controls may still be able to obtain rights circumvention technology from those who can, without either violating section 1201.

**\*298 Introduction**

Technological protection measures (TPMs) have allowed copyright owners and others with rights in a copyrighted work (“rights holders”)<sup>1</sup> to control access to, and use of,

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<sup>1</sup> The author will use the term “rights holders” to describe those persons that possess one or more rights (usually exclusive rights) regarding the reproduction and use of a particular copyrighted work. Such persons may include the actual copyright holders, or it may include individuals such as performers, producers, and broadcasters who may not hold a copyright in the work, but may nevertheless possess some exclusive right in the work. *See e.g.*, 17 U.S.C. § 1101 (2009) (stating that performers have exclusive rights to the fixation and

their copyrighted works sold and distributed in the digital environment. There are two types of TPMs:<sup>2</sup> access controls and rights (copy) controls.<sup>3</sup> Section 1201(a)(1)(A) of the U.S. Copyright Act prohibits the circumvention of access controls.<sup>4</sup> Section 1201, however, does not prohibit the circumvention of rights controls.<sup>5</sup> By allowing the circumvention of rights controls, Congress left open a small, perhaps token crack in the fair use window that a prohibition against circumvention of all TPMs (i.e., access and rights (copy) controls) threatened to close in the digital environment.<sup>6</sup> In other words, Congress essentially allowed those persons who are authorized to bypass access controls on a work to then circumvent the rights controls on that work. The assumption was that such persons would either use or reproduce the work for fair use purposes, \*299 or the person would infringe the work, thereby violating pre-existing provisions in Title 17. This Article will discuss some ways individuals who cannot circumvent rights controls may still be able to obtain rights circumvention technology from those who can, without either violating section 1201. In other words, this Article discusses how the token crack in the fair use window left open by Congress in section 1201 may be open slightly wider than most have previously thought—technically speaking.

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distribution of their live performances; this is despite there being no copyright in the actual sound recording of the live performance).

<sup>2</sup> See S. Rep. No. 105-190, at 12 (1998) (describing the difference between access and rights (copy) controls).

<sup>3</sup> Rights controls and copy controls refer to the same technology—technology that protects someone’s rights in a work by limiting a user’s ability to use or reproduce, i.e., copy, the protected work. Although the U.S. Copyright Act uses the term “rights controls,” the legislative history uses the term “copy controls.” See *id.* at 29 (1998). The author, therefore, will use the term “rights (copy) controls.”

<sup>4</sup> 17 U.S.C. § 1201.

<sup>5</sup> See S. Rep. No. 105-190, at 12 (1998) (stating that “there is no prohibition on conduct in 1201(b) akin to the prohibition on circumvention conduct in 1201(a)(1)”).

<sup>6</sup> See 144 CONG. REC. H7093 (daily ed. Aug. 4, 1998) (letter of Rep. Coble, Chair, Subcomm. on Courts and Intellectual Prop., House Judiciary Comm., to Rep. Campbell and Rep. Boucher (June 16, 1988)) (stating “the bill [1201] contained no prohibition on the act of circumvention [sic] itself, leaving users free to circumvent such measures in order to make fair use copies”).

## I. Background

### A. TPMs: Rights Holders' Reaction to Digital Technology

Digital technology and expansion of the Internet have opened up a new world for the transmission and reproduction of data, much of which is copyrighted material. Whether the copyrighted material is a song, video, movie, software, picture, etc., copyright owners' main concerns are controlling access to their works and controlling the reproduction and use of their works. Instead of initially finding ways to embrace new technology, such as the Internet, by finding ways to use it to their advantage, the initial, natural reaction of rights holders is a defensive one.<sup>7</sup> Rights holders primary fear is that a new technology that allows users to reproduce a copyrighted work will result in uncontrolled infringement. Rights holders fear that they will effectively lose the ability to enforce the copyright in their work and, therefore, the ability to control the commercial exploitation of the work.<sup>8</sup>

**\*300** Rights holders' fears of digital technology and the Internet are well-founded. Digital technology allows for the creation of an unlimited number of exact copies of a copyrighted work. The Internet then allows for the almost instantaneous distribution of exact copies of a copyrighted work to every computer or device in the world that has Internet access. In response to the very real fear of rampant and uncontrolled infringement,

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<sup>7</sup> The music industry finally realized that selling songs with digital rights management (DRM) technology that limit a buyer's use of the song were counterproductive. Apple and record companies now offer songs without DRM for a higher price than songs with DRM. Brad Stone, *Want to Copy iTunes Music? Go Ahead Apple Says*, NYTIMES.COM, Jan. 7, 2009, at B1, available at <http://www.nytimes.com/2009/01/07/technology/companies/07apple.html>.

<sup>8</sup> For example, the music industry once thought that the Player Piano would destroy the music business. ANTHONY V. LUPO, MUSIC ON THE INTERNET: UNDERSTANDING THE NEW RIGHTS & SOLVING NEW PROBLEMS 345 (vol. 1 2001). Then the music industry saw the introduction of cassette tapes as sounding the death knoll for the music industry. David Salvator, *Which Online Music Service is Best?*, EXTREMETECH.COM, Apr. 8, 2005, <http://www.extremetech.com/article2/0,1558,1784304,00.asp>. Similarly, the movie industry initially felt that the VCR would ruin the movie industry. Jack Valenti, the former president of the Motion Picture Association of America graphically said, "The VCR is to the movie industry as the Boston Strangler was to a woman alone." Lupo, *supra* note 8, at 345.

rights holders created TPMs, which are a type of digital rights management (DRM).<sup>9</sup> TPMs protect a copyrighted work by limiting access to the work and/or by limiting or prohibiting reproduction of the work. Rights holders have used TPMs since the beginning of the digital age, usually with success.<sup>10</sup> In addition to the problem of widespread distribution of physical devices that one can use to circumvent TPMs,<sup>11</sup> the Internet allowed the few individuals who were able to decrypt or circumvent TPMs to disseminate their circumvention technology (i.e., software), to anyone with an Internet connection.<sup>12</sup>

### ***B. Protection of TPMs***

In 1996, The World Intellectual Property Organization (WIPO) adopted two treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.<sup>13</sup> In response \*301 to the dangers rights holders faced regarding the circumvention of TPMs, both treaties contained language requiring countries that were party to the treaties to “provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures” used by authors, and performers or producers of phonograms, in connection with their works.<sup>14</sup>

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<sup>9</sup> DRM systems are usually divided into two categories: TPMs and copyright management information or technological identification measures. MUSIC UNLEASHED: LEGAL IMPLICATIONS OF MOBILE MUSIC DISTRIBUTION 140-41 (Rolf Auf der Maur & Marc Jacobson eds. 2004).

<sup>10</sup> Robert C. Denicola, *Access Controls, Rights Protection, and Circumvention: Interpreting the Digital Millennium Copyright Act to Preserve Noninfringing Use*, 31 COLUM. J.L. & ARTS 209, 210 (2008) (providing an example of how the early floppy disks contained TPMs).

<sup>11</sup> For example, physical devices that decrypt or bypass TPMs on a DVD, allowing a user to make unlimited copies of the copyrighted work contained on the DVD.

<sup>12</sup> See, e.g., Scarlett Pruitt, *Norwegian Authorities Indict Creator of DeCSS*, CNN.COM, Jan. 14, 2002, <http://archives.cnn.com/2002/TECH/industry/01/14/decss.writer.idg/index.html> (discussing the indictment of a Norwegian teenager who had circumvented a rights control TPM used on DVDs and then posted his circumvention software on the Internet).

<sup>13</sup> S. Rep. No. 105-190, at 4-5 (1998).

<sup>14</sup> WIPO Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65, 68 (1997), available at <http://www.wipo.org/eng/diplconf/distrib/94dc.html>; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76, 81 (1997), available at <http://www.loc.gov/copyright/wipo/treaty2.html>.

In part to implement the WIPO treaties,<sup>15</sup> Congress passed the Digital Millennium Copyright Act (DMCA) in 1998. The DMCA added, among other chapters and provisions, Chapter 12 to the U.S. Copyright Act, which is titled Copyright Protection and Management Systems.<sup>16</sup> Chapter 12 protects rights holders from the circumvention of certain TPMs and from the circumvention of copyright (or rights) management information.<sup>17</sup> As section 1201 of Chapter 12 indicates, TPMs consist of two technologies: those that protect *access* to a copyrighted work (access controls) and those that control a user's ability to *copy/use* the work (rights (copy) controls).<sup>18</sup> An example of an access control is an encryption mechanism on a digital work that prevents users from accessing the work unless they are authorized users with the correct "key."<sup>19</sup> Once a person accesses a work, rights (copy) controls may be in place to protect the copyright owner's exclusive rights in the work by controlling a user's ability to use or reproduce the work.<sup>20</sup>

**\*302** Section 1201(a)(1)(A) of the DMCA prohibits the *circumvention of access* controls.<sup>21</sup> Section 1201(a)(2) prohibits the *manufacture and trafficking* of technology, devices, services, etc., that circumvent *access* controls.<sup>22</sup> Section 1201(b)(1) prohibits the *manufacture and trafficking* of technology, devices, etc., that circumvent *rights* controls.<sup>23</sup>

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<sup>15</sup> S. Rep. No. 105-190, at 4-5 (1998).

<sup>16</sup> 17 U.S.C. §§ 1201-05 (2009).

<sup>17</sup> S. Rep. No. 105-190, at 27 (1998); *id.* at 29; *see also id.* at 11 n.18 (describing copyright management information as being information attached to the work that describes the author of the work, the owner of the work, and information regarding terms and conditions of use of the work).

<sup>18</sup> 17 U.S.C. § 1201(a) and (b); *see also* MUSIC UNLEASHED, *supra* note 9 (discussing the two types of TPMS).

<sup>19</sup> MUSIC UNLEASHED, *supra* note 9, at 142.

<sup>20</sup> *See id.* at 9 (discussing the Serial Copyright Management System in the United States, which was part of the Audio Home Recording Act of 1992).

<sup>21</sup> 17 U.S.C. § 1201(a)(1)(A) (stating, "No person shall circumvent a technological measure that effectively controls access to a work protected under this title").

<sup>22</sup> *Id.* § 1201(a)(2)(A), (B), and (C).

<sup>23</sup> *Id.* § 1201(b)(1).

Interestingly, there is no prohibition against the circumvention of rights controls.<sup>24</sup>

Congress intended this distinction.

### *C. The Fair Use Window*

Congress acknowledged the uncertainty of how digital technology and the Internet would develop.<sup>25</sup> Nevertheless, it seemed certain that most songs, movies, software, books, etc., would be transmitted through the Internet at some point in the future.<sup>26</sup> Congress and certain interest groups, therefore, feared that a prohibition in section 1201 of the circumvention of all TPMs (access and rights controls) would give rights holders complete and total control over their works in the digital environment, effectively creating a “pay-to-view” society and foreclosing any fair use of these works.<sup>27</sup> The fair use doctrine is codified,<sup>28</sup> and the U.S. Supreme Court has stated that individuals have the right to reproduce a copyrighted work to make fair use of it.<sup>29</sup> Therefore, Congress enacted specific exemptions to 1201(a)(1)(A)’s prohibition of the circumvention of access controls in an attempt to balance fair use, technological development, \*303 and rights holders’ attempts to protect their works.<sup>30</sup> However, these exemptions pertain only to certain organizations and institutions such as schools, libraries, and law enforcement and government organizations, and not to individuals (or even the media).<sup>31</sup> Most importantly, some of these exemptions only indirectly allow fair use.<sup>32</sup>

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<sup>24</sup> See generally *id.* § 1201.

<sup>25</sup> 144 CONG. REC. H7093 (daily ed. Aug. 4, 1998) (statement of Rep. Bliley).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*; see also *id.* at H7101 (daily ed. Aug. 4, 1998) (statement of Rep. Stearns).

<sup>28</sup> 17 U.S.C. § 107.

<sup>29</sup> “Any individual may reproduce a copyrighted work for a ‘fair use’; the copyright owner does not possess the exclusive right to such a use.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984).

<sup>30</sup> 144 CONG. REC. H7093 (daily ed. Aug. 4, 1998) (statement of Rep. Bliley).

<sup>31</sup> 17 U.S.C. § 1201(d)-(k).

<sup>32</sup> See, e.g., S. Rep. No. 105-190, at 31 (1998) (stating that the exemption in section 1201(e) allows libraries

In addition, Congress left open a very small, perhaps token crack in 1201 for the fair use of works protected by rights controls for individuals and organizations.<sup>33</sup> The Senate Report on section 1201 states that while section 1201(a) prohibits the circumvention of access controls, section 1201(b) does not “prohibit the circumvention of effective technological copyright protection measures [i.e., rights (copy) controls].”<sup>34</sup> In other words, “where a copy control technology is employed to prevent unauthorized reproduction of a work, the circumvention of that technology would not itself be actionable under 1201.”<sup>35</sup> The reason for this distinction is because Congress felt that any reproduction of the work after the rights (copy) control technology had been circumvented “would remain subject to the protections embodied in title 17 [i.e., the U.S. Copyright Act].”<sup>36</sup> In other words, once a person has circumvented a rights (copy) control protecting a work that they are authorized to access, any subsequent reproduction or use \*304 of that work would remain subject to copyright infringement. Congress effectively allowed users to make fair use of a work if the user was authorized to access the work and had the technical ability to circumvent the rights controls protecting the work.<sup>37</sup> In fact, Congress

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to circumvent an access control on a work for the purpose of determining whether they would like to purchase the work; the work could then be used for fair use purposes by library users; therefore, the exemption does not directly allow fair use, but rather indirectly allows fair use).

<sup>33</sup> See 144 CONG. REC. H7093 (daily ed. Aug. 4, 1998) (letter of Rep. Coble, Chair, Subcomm. on Courts and Intellectual Prop., House Judiciary Comm., to Rep. Campbell and Rep. Boucher (June 16, 1988)) (stating “the bill [1201] contained no prohibition on the act of circumvention [sic] itself, leaving users free to circumvent such measures in order to make fair use copies”).

<sup>34</sup> S. Rep. No. 105-190, at 29 (1998).

<sup>35</sup> *Id.* at 29; see also *id.* at 12 (stating “The prohibition in 1201(a)(1) is necessary because prior to this Act, the conduct of circumvention was never before made unlawful. The device limitation in 1201(a)(2) enforces this new prohibition on conduct. The copyright law has long forbidden copyright infringements, so no new prohibition was necessary. The device limitation in 1201(b) enforces the longstanding prohibitions on infringements.”); *id.* at 28 (stating that although paragraph (a)(1) prohibits circumvention of access controls, it “does not apply to the subsequent actions of a person once he or she has obtained authorized access to a copy of a work protected under title 17, even if such actions involve circumvention of other types of technological protection measures”)

<sup>36</sup> *Id.* at 29.

<sup>37</sup> See 144 CONG. REC. H7093 (daily ed. Aug. 4, 1998) (letter of Rep. Coble, Chair, Subcomm. on Courts

made clear that section 1201 did not affect fair use by adding a provision in section 1201 that provided, “Nothing in this section shall affect . . . fair use, under this title.”<sup>38</sup>

## II. Acquiring Rights (Copy) Control Circumvention Technology

Although the circumvention of rights (copy) control technology is allowed, actually circumventing rights controls requires highly advanced technical skills, which most people lack. Therefore, most individuals are unable to make fair use of a copyrighted work to which they have authorized access (i.e., can legally bypass the access control), if that work is protected by a rights control.<sup>39</sup> Moreover, it would appear that individuals who are unable to circumvent rights controls cannot obtain rights control circumvention technology.<sup>40</sup> This is because section 1201(b)(1) prohibits any person who is able to circumvent rights control technology, or who has access to such technology or device, from manufacturing, importing, offering to the public, providing, or otherwise trafficking that rights control circumvention technology or device. Nevertheless, would someone who is capable of creating rights control circumvention \*305 technology be able to provide this circumvention technology to his or her friends and family? It seems that the answer is yes.

### A. Providing Rights Circumvention Technology to Friends and Family

Section 1201(b)(1) does not prohibit an individual from providing or offering rights

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and Intellectual Prop., House Judiciary Comm., to Rep. Campbell and Rep. Boucher (June 16, 1988)) (stating “the bill [1201] contained no prohibition on the act of circumvention [sic] itself, leaving users free to circumvent such measures in order to make fair use copies”).

<sup>38</sup> “Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.” 17 U.S.C. § 1201(c) (2009).

<sup>39</sup> One commentator has stated, “It is unclear whether Congress intended for the technologically savvy who could ‘do it themselves’ to be the only ones who could engage in privileged acts of circumvention.” Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 551 (1999).

<sup>40</sup> The author’s use of “technology” may also include the other items listed in section 1201(a)(2) and 1201(b)(1)--product, service, device, component, or part thereof--where appropriate. The author has used “technology” throughout for brevity and because “technology” would encompass most anything (usually software) that was capable of circumventing a TPM.

control circumvention technology to friends and family. Section 1201(b)(1) states, “No person shall manufacture, import, offer to the public, provide, or otherwise traffic . . .”<sup>41</sup> in rights control circumvention technology. Congress, however, does not define these prohibitions in section 1201(b)(1). Courts give “the words of a statute their *ordinary, contemporary, common meaning*, absent an indication Congress intended them to bear some different import.”<sup>42</sup> Courts look to dictionaries for the ordinary, plain meaning of a word undefined by a statute if Congress has not indicated a meaning for the word.<sup>43</sup>

“Manufacture” in section 1201 refers to the commercial, large-scale production of circumvention measures. To “manufacture” something means to make something, usually on a large scale.<sup>44</sup> If “manufacture” is interpreted to mean the creation of circumvention technology by one person for personal use, then the prohibition against the “manufacture” of rights controls in section 1201(b)(1) would effectively prevent anyone from circumventing rights controls, even for personal use. Congress, however, specifically intended to allow individuals to circumvent rights controls by not prohibiting the circumvention of rights controls in section 1201.<sup>45</sup> Therefore, interpreting “manufacture” to mean the creation of rights circumvention technology \*306 by an individual, where the individual does not sell or offer the technology to the public, would clearly violate an “expressed legislative intent to the contrary.”<sup>46</sup>

The prohibition against “import[ing]” refers to the bringing in of goods from a

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<sup>41</sup> 17 U.S.C. § 1201(b)(1).

<sup>42</sup> *Williams v. Taylor*, 529 U.S. 420, 431 (2000).

<sup>43</sup> *U.S. v. Granderson*, 511 U.S. 39, 71 (1994).

<sup>44</sup> Manufacture(v): “to make by hand or, especially, by machinery, often on a large scale and with division of labor.” WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 1098 (2d ed. 1975).

<sup>45</sup> See notes 33-38 and accompanying text.

<sup>46</sup> “If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.” *Reves v. Ernst & Young*, 506 U.S. 170, 177 (1993).

foreign country to be sold to the public.<sup>47</sup> The prohibition against “offer[ing]” rights control circumvention technology to the public (“offer to the public”) obviously refers to the selling or providing of circumvention technology to the public. To “traffic” means to distribute goods to the public.<sup>48</sup>

The prohibition against “provid[ing]” rights control circumvention technology may seem as if it would prohibit an individual from providing his or her friends and family with such technology. However, if one looks at the context of the prohibition against “provid[ing]” rights control circumvention technology, it seems that Congress intended the prohibition to apply only to the selling or providing of the technology to the public. This is because of three reasons. First, the context in which “provide” is used suggests that it refers to providing circumvention technology to the public. The other prohibitions--manufacturing, importing, offering to the public, and trafficking--all refer to the selling or distribution of circumvention technology to the public, usually for commercial gain. Second, the use of the phrase, “or otherwise,” before “traffic” and after “provide” (i.e., “provide, or otherwise traffic”) indicates that “provide” is a type of trafficking.<sup>49</sup> Trafficking, as shown above, constitutes the selling or giving of the technology to the public, usually for commercial purposes. Therefore, “provide,” as used in section 1201, means providing, i.e., trafficking, circumvention technology to the public. Third, Congress intended parts (a)(2) and (b)(1) of section 1201 “to target ‘black boxes,’

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<sup>47</sup> Import (v): “to bring (goods) from a foreign country into one’s own country in commerce.”  
DICTIONARY, *supra* note 44, at 914.

<sup>48</sup> Traffic (v): “to pass goods and commodities from one person to another for an equivalent in goods or money; to carry on commerce ....” *Id.* at 1935. *See also* 17 U.S.C. §1101 (2009) (providing a definition of “traffic in” specifically for section 1101: to “transport, transfer, or otherwise dispose of, to another, as consideration for anything of value, or make or obtain control of with intent to transport, transfer, or dispose of”).

<sup>49</sup> “No person shall manufacture, import, offer to the public, provide, or *otherwise traffic* in any technology, product, service, device, component, or part thereof . . .” 17 U.S.C. § 1201(b)(1) (emphasis added).

and to ensure that legitimate multipurpose devices can continue to be made and sold.”<sup>50</sup> This indicates an intent to prohibit the selling and offering of circumvention technology and devices to the public, not the distribution of such technology to one’s friends and family. Therefore, an individual *may* provide rights control circumvention technology that they have developed or obtained to people not part of the public.

Congress, however, does not explicitly define “public.” As noted earlier, courts give “the words of a statute their *ordinary, contemporary, common meaning*, absent an indication Congress intended them to bear some different import.”<sup>51</sup> Courts look to dictionaries for the ordinary, plain meaning of such undefined words.<sup>52</sup> The dictionary definition of “public” is: “the people as a whole.”<sup>53</sup> In section 101 of the U.S. Copyright Act, however, Congress defined the adjective “publicly.”<sup>54</sup> If one looks at Congress’s definition of “publicly,” it seems that Congress implies a definition for “public”: “a substantial number of persons outside of a normal circle of a family and its social acquaintances.”<sup>55</sup> At the minimum, therefore, one can safely say that **\*308** “public,” within the context of the U.S. Copyright Act, refers to “a substantial number of persons outside of a normal circle of a family and its social acquaintances” where “social acquaintances” would imply friends of the family members. Therefore, an individual may provide rights control circumvention technology that they have developed or obtained to their “normal circle of family and its social acquaintances.”

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<sup>50</sup> S. Rep. No. 105-190, at 29 (1998); *see also* 144 CONG. REC. H7094 (daily ed. Aug. 4, 1998) (statement of Rep. Bliley) (stating that sections 1201(a)(2) and 1201(b)(1) are “aimed fundamentally at outlawing so-called ‘black boxes’ that are expressly intended to facilitate circumvention of protection measures”).

<sup>51</sup> *Williams v. Taylor*, 529 U.S. 420, 431 (2000).

<sup>52</sup> *U.S. v. Granderson*, 511 U.S. 39, 71 (1994).

<sup>53</sup> Public: “the general body of a nation, state, or community; the people as a whole; the community at large.” *DICTIONARY*, *supra* note 44, at 1457.

<sup>54</sup> “[A] place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered . . .” 17 U.S.C. § 101.

<sup>55</sup> *Id.*

## **B. Receiving Rights Circumvention Technology**

### **1. Hiring Someone to Circumvent Rights Controls**

One can push the envelope with section 1201 and its non-prohibition of the circumvention of rights controls a bit further by looking at a couple of scenarios where there is an individual who is unable to circumvent rights controls, and who does not have a friend or family member capable of circumventing rights controls. First, a person may circumvent rights controls. Second, there is no prohibition against hiring someone for the purpose of circumventing rights controls. Therefore, it would be legal to hire someone, a contractor,<sup>56</sup> to circumvent rights controls.

The only problem with this scenario would be whether the creation of circumvention technology by the contractor for the employer violates section 1201(b)(1), i.e., the prohibition against manufacturing, importing, offering to the public, providing, or otherwise trafficking in rights control circumvention technology. As stated earlier in this Article, the meaning of “manufacture” does not, and cannot, include the one-time creation of rights control **\*309** circumvention technology by an individual<sup>57</sup>—the contractor in this example. “Import[ing]” and “traffic[king]” are not occurring. The only remaining question is whether the contractor is violating the prohibition against “offer[ing] the public” or “provid[ing]” to the public rights control circumvention technology. The answer is likely no, because assuming that the contractor only offered that particular type of rights control

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<sup>56</sup> Based on agency law, hiring someone for a short period and for a specific purpose because of his or her specific skill set would constitute an employer-contractor relationship as opposed to an employer-employee relationship. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989) (listing many of the factors to be applied in determining whether an employer-employee relationship exists). The work for hire doctrine only applies if there is an employer-employee relationship. *See* 17 U.S.C. § 101 (stating that a “work made for hire” includes “a work prepared by an employee within the scope of his or her employment”); *see also* 17 U.S.C. § 201(b) (codifying the work for hire doctrine).

<sup>57</sup> *See supra* notes 44-46 and accompanying text for an explanation of why such an interpretation would violate Congressional intent.

circumvention technology to the employer, the contractor did not “offer” or “provide” it to the public, i.e., “a substantial number of persons outside of a normal circle of [his or her] family and its social acquaintances.” Therefore, the contractor will not violate section 1201(b)(1) if he or she provides the rights circumvention technology to less than “a substantial number of persons”<sup>58</sup> outside of his or her family and its social acquaintances. The employer and contractor could then use this circumvention technology to make fair use of works protected by the rights control technology that the circumvention technology bypasses.

The work for hire doctrine comes into play if the relationship between the employer and the person circumventing rights control technology for the employer is considered an employer-employee relationship.<sup>59</sup> For example, there may be a pre-existing employer-employee relationship and, at some point, the employer discovers that the employee has the ability to circumvent rights controls. The work for hire doctrine comes into play for the following reasons. First, circumvention technology is usually software, whether purely in software form and sent over the Internet or whether the software is embedded in some device. Second, software is **\*310** copyrightable.<sup>60</sup> Therefore, if the circumvention technology constitutes a copyrightable software program, the employer, not

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<sup>58</sup> Of course, it is unclear what “a substantial number of persons” would constitute.

<sup>59</sup> The individual employed by the employer may be considered an employee if certain factors are met: e.g., if the employer has control over the individual’s hours; if the employer pays the individual a wage instead of a fee for each circumvention; if the use of circumvention of rights control technology is the ordinary business of the employer, etc. *See Cmty. for Creative Non-Violence*, 490 U.S. at 751.

<sup>60</sup> Computer programs/software are copyrightable. *See* Copyright Registration for Computer Programs, <http://www.copyright.gov/circs/circ61.pdf> (stating the Copyright Office’s procedure for registering computer programs) (last visited February 16, 2009); *see also* 17 U.S.C. § 101 (providing the definition of a “computer program”). If the circumventing individual is considered a contractor, then this individual is considered the author of the circumvention program/software. In other words, the work for hire doctrine does not apply if there is a contractor-employer relationship. The doctrine only applies if there is an employee-employer relationship. *See* 17 U.S.C. § 201(b) (codifying the work for hire doctrine); *see also* 17 U.S.C. § 101 (providing the definition of a “work made for hire”).

the employee, is the author and copyright holder of the technology, according to the work for hire doctrine. Technically speaking, therefore, the employee has not violated section 1201(b)(1) because the employee has not manufactured, imported, offered to the public, provided, or otherwise trafficked in rights control circumvention technology. This is because, according to the work for hire doctrine, the employer, not the employee, is the author, i.e., creator, of the circumvention software. The employer may then circumvent rights controls with this circumvention technology that he or she “created.”

## 2. Forming a “Person” to Circumvent Rights Controls

As mentioned earlier, section 1201 of the DMCA prohibits a “person” from circumventing access controls.<sup>61</sup> It also prohibits a “person” from manufacturing, importing, offering to the public, providing, or otherwise trafficking in technology or devices that circumvent access controls,<sup>62</sup> or rights controls.<sup>63</sup> Because Congress used the term “person,” and not “individuals,” in section 1201, the lack of any prohibition against the circumvention of rights controls must conversely apply to “persons.” In other words, “persons” are allowed to circumvent rights controls. Although section 1201 (or Title 17 for that matter) provides no \*311 definition for “persons,”<sup>64</sup> it is clear that the term “persons,” when used in section 1201, means more than just an individual, i.e., natural person.

Congress has explicitly stated that the word “persons,” when used in legislation, shall include, “unless the context indicates otherwise . . . corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as

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<sup>61</sup> 17 U.S.C. § 1201(a)(1)(A).

<sup>62</sup> *Id.* § 1201(a)(2).

<sup>63</sup> *Id.* § 1201(b)(1).

<sup>64</sup> *See generally, id.* § 1201 (containing no definition for “person”).

individuals.”<sup>65</sup> There seems to be no evidence in the language of 1201, or the legislative history of the DMCA, to indicate that Congress intended “persons,” as used in section 1201, to mean anything other than “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”<sup>66</sup> Therefore, because “person” includes corporate entities, such as a corporation or limited liability company (“LLC”), the circumvention of rights controls by such an entity would be allowed or--more correctly stated--not prohibited by section 1201.<sup>67</sup>

Therefore, an individual who is unable to circumvent rights controls could form an entity (i.e., a “person”), such as an LLC, to circumvent rights controls. Even an existing LLC could circumvent rights controls. Incorporating an LLC is fairly simple and inexpensive.<sup>68</sup> In addition, some states (e.g. Delaware) only require that one person form the LLC<sup>69</sup> and that the LLC have one member.<sup>70</sup> Once such an individual has registered the LLC, he or she can hire a tech-savvy \*312 individual as an employee of the LLC, or even make them a member of the LLC, for the purpose of circumventing rights control measures on copyrighted material to which they have authorized access. In such a scenario, any circumvention software that was copyrightable would be the property of the LLC under the work for hire doctrine, negating any discussion of whether the tech-savvy

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<sup>65</sup> 1 U.S.C. § 1 (2009).

<sup>66</sup> In addition, statutes that do define the term “persons” define it as “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” *See e.g.*, 31 U.S.C. § 3801(a)(6); 16 U.S.C. § 796(4); 33 U.S.C.S. § 1362(5); 5 U.S.C.S. § 551(2); 11 U.S.C. § 101(41); and 33 U.S.C.S. § 1362(5).

<sup>67</sup> The intent of Congress, of course, was to prevent such entities from creating and selling “black box” devices to the public. S. Rep. No. 105-190, at 29 (1998); *see also* 144 CONG. REC. H7094 (daily ed. Aug. 4, 1998) (statement of Rep. Bliley) (stating that sections 1201(a)(2) and 1201(b)(1) are “aimed fundamentally at outlawing so-called ‘black boxes’ that are expressly intended to facilitate circumvention of protection measures”).

<sup>68</sup> Incorporating an LLC in Delaware, for example, requires only the filing of a Certificate of Formation and the paying of a \$90 filing fee. State of Delaware official website, <http://corp.delaware.gov/newentit.shtml> (click on “Limited Liability Company Formation” hyperlink).

<sup>69</sup> 6 Del. Code Ann. § 18-201(a).

<sup>70</sup> *Id.* § 18-101(6).

individual had violated section 1201(b)(1) by creating the circumvention technology for another “person.”<sup>71</sup>

State codes, such as Delaware’s, require that an LLC, or other corporate entity, be set up for a “lawful business, purpose, or activity.”<sup>72</sup> “Lawful” modifies “business, purpose, or activity.” The formation of an LLC, therefore, must be for either a “lawful business,” a “lawful purpose,” or a “lawful activity.” In other words, it is not required that the LLC be formed to pursue a “lawful business.” Therefore, circumvention of rights controls by an LLC is legal and would be a “lawful purpose” or “lawful activity,” as required by Delaware law.

Nevertheless, the circumvention of rights controls by LLCs (or other “persons”) would only be a “lawful purpose” if the circumvention technology was not manufactured, imported, offered to the public, provided, or otherwise trafficked, thereby violating section 1201(b)(1). As shown in Part II.A. of this Article, importing, offering to the public, providing, and trafficking all refer to offering or distributing circumvention technology to the public. Therefore, the LLC could circumvent rights controls, but only the members of the LLC and their family would be able to use the technology. This would include LLCs created solely for the purpose of **\*313** circumventing rights controls, and existing LLCs that were involved in unrelated business activities, but that were also used to circumvent rights controls.<sup>73</sup>

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<sup>71</sup> See *supra* notes 59-60 and accompanying text, discussing the work for hire doctrine in a scenario where the employer is an individual and not an LLC.

<sup>72</sup> 6 Del. Code Ann. § 18-106(a) (stating, “A limited liability company may carry on any lawful business, purpose or activity, whether or not for profit ...”); see also 8 Del. Code Ann. § 101(b) (stating, “A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this State”).

<sup>73</sup> If an LLC with a pre-existing business purpose hires a tech-savvy individual to circumvent rights control TPMs, that individual would be considered a contractor. See *supra* notes 56-58 and accompanying text, discussing how a contractor could create rights control circumvention technology for an employer and not

There is a question, however, as to whether “manufacture” means the creation of something by a corporate entity on a large scale (i.e., to be sold and distributed to the public), or whether it also includes the creation of anything by a corporate entity. It must mean the former, otherwise it would contravene Congress’s intent to allow persons to circumvent rights controls.<sup>74</sup> In addition, in the context of the other prohibitions in section 1201(b)—all of which refer to the selling or distributing of rights control circumvention technology to the public--the prohibition against manufacturing such technology must refer to large-scale creation of circumvention technology to be sold to the public. Finally, Congress intended parts (a)(2) and (b)(1) of section 1201 target the large-scale manufacturing of “black boxes” and subsequent selling of them to the public.<sup>75</sup>

A final question arises as to whether the rights control circumvention technology created by the LLC may only be used by the LLC. The LLC (i.e., the “person) that is circumventing rights controls is creating the circumvention technology and, therefore, owns the technology.<sup>76</sup> In other words, the question is whether the member or members of the LLC would be able to use the technology for his, her, or their personal use. There seems to be no state or federal legislation to prohibit members of an LLC from personally using something created by the LLC of which \*314 they are members. At the most, the LLC, which is considered a separate legal entity, could be said to have “provided” the members rights control circumvention technology, thereby violating section 1201(b)(1). By doing

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violate section 1201(b)(1).

<sup>74</sup> See *supra* notes 44- 46 and accompanying text for an explanation of why such an interpretation would violate Congressional intent.

<sup>75</sup> S. Rep. No. 105-190, at 29 (1998) (stating that the purpose of parts (a)(2) and (b)(1) of section 1201 was “to target ‘black boxes,’ and to ensure that legitimate multipurpose devices can continue to be made and sold”).

<sup>76</sup> This assumes that either an employee of the LLC has circumvented the rights control, granting the LLC ownership of the technology under the work for hire doctrine, or that a contractor hired by the LLC to circumvent a rights control has given the LLC ownership rights in the circumvention technology.

so, however, the question is whether the LLC provided the technology to the “public,” i.e., “a substantial number of persons outside of a normal circle of a family and its social acquaintances.” An LLC, of course, has no “family.” However, the members of an LLC are not part of the “public” per se, but rather parts that make up the LLC (i.e., the “person”). Therefore, the use of LLC-created circumvention technology by members of the LLC would likely not violate section 1201(b)(1), especially if the members used the technology for fair use purposes.<sup>77</sup>

A member of the LLC could also allow his or her family and its social acquaintances to use the circumvention technology created by the LLC. Such a distribution of the rights control circumvention technology is not a manufacturing, offering, providing, or trafficking of circumvention technologies to the *public* and, therefore, not a violation of section 1201(b)(1).

### Conclusion

Congress allowed for the circumvention of rights controls in a token attempt to permit fair use of works in the digital age that are protected by TPMs. However, one must first have authorization to bypass the access control on a work (usually by paying for a “key”) and then one must be able to circumvent the rights controls on the work. Ultimately, very few people are able to do the latter and some may not even be able to afford to do the former. This Article discussed \*315 a few ways that someone who is unable to circumvent

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<sup>77</sup> Normally, corporate entities provide its members or directors with limited liability, meaning that they are not liable for good faith mistakes while making decisions as a representative of the corporate entity. If the members of the LLC, however, used the technology for purposes that violated section 1201 or other provisions in Title 17, such as selling the technology to the public or selling illegal reproductions of copyrighted works to the public, the members would not be protected by the limited liability that usually exists for members of an LLC. This is because by using the LLC to create circumvention technology that they then use for personal profit by infringing copyrights and violating section 1201, the members have created and used the LLC for an unlawful purpose. The “corporate veil” would be pierced, so to speak, and the members would be personally liable for their actions.

rights controls may still be able to obtain rights control circumvention technology. Although this Article showed that this token crack left open by Congress in the fair use window is slightly wider than one initially thinks--technically speaking--the number of people who are able to obtain rights circumvention technology, pursuant to the scenarios presented in this Article, is still very low.

Despite the lack of fair use opportunities for most people with legal access to copyrighted works in a digital format, the opposite scenario is also quite disconcerting--at least for rights holders. If Congress would do away with section 1201(b)(1) and allow rights circumvention technology to be manufactured and distributed to the public to allow anyone with authorized access to a work to make fair use of it,<sup>78</sup> infringement and subsequent revenue losses for rights holders would likely increase dramatically. This is because those who would use rights circumvention technology for infringement purposes would have easy access to it. Armed with this technology, these individuals would be able to quickly make and distribute an unlimited number of copies of the work using digital technology and the Internet. However, some industries, such as the music industry, are finding that the use of TPMs has not only failed to curb infringement, but actually increased infringement as users sought out illegal sources for TPM-free songs that they could copy onto many different devices.<sup>79</sup> Perhaps the market and the current inability to police the Internet will force rights holders to follow the music industry and offer TPM-free versions of their works. Ultimately, however, users who want to obtain a work

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<sup>78</sup> Congress could not allow circumvention and the manufacturing and trafficking of all circumvention technologies because that would violate the WIPO treaties, which the United States is a party to. See *supra* note 14 and accompanying text.

<sup>79</sup> See Stone, *supra* note 7 (discussing how Apple and the music industry are now offering songs with no TPMs (a type of DRM) for a slightly higher price than songs with TPMs in the hope of offering consumers what they want--the ability to copy songs to their various devices).

for fair use purposes, or even illegal purposes, will usually find a way to do so, whether it be \*316 through a library, a file sharing network, friends and family, or one of the scenarios discussed in this Article. Therefore, it seems Congress struck the best balance that it could between fair use and the interest of rights holders in light of the inability to police the entire Internet and the dangers of infringement in the digital age.

Rights holders, however, may be closing the token crack in the fair use window completely as they merge access and rights controls.<sup>80</sup> Courts faced with issues of circumvention of such merged controls seem to favor the rights holders by holding that circumventing the rights control portion of the merged control effectively constitutes a circumvention of the access control, which is prohibited.<sup>81</sup> If Congress's token crack in the fair use window is to remain open, it will have to amend section 1201 to address such merged controls by perhaps requiring that rights holders distinctly separate access and rights controls.

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<sup>80</sup> Anthony Reese, *The Law and Technology of Digital Rights Management: Will Merging Access and Rights Controls Undermine the Structure of Anticircumvention Law?*, 18 BERKELEY TECH. L.J. 619, 650 (2003).

<sup>81</sup> *Id.* at 650-51.