

# CATCH 1201: A LEGISLATIVE HISTORY AND CONTENT ANALYSIS OF THE DMCA EXEMPTION PROCEEDINGS

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## ABSTRACT

*17 U.S.C. § 1201(a)(1) prohibits circumventing a technological protection measure (TPM) that effectively controls access to a copyrighted work. In the name of mitigating the innocent casualties of this new ban, Congress constructed a triennial rulemaking, administered by the Register of Copyrights, to determine temporary exemptions. This paper considers the legislative history of this rulemaking, and it reports the results of a systematic content analysis of its 2000 and 2003 proceedings.*

*Inspired by the literature on political agendas, policymaking institutions, venue shifting, and theories of delegation, we conclude that the legislative motivations for § 1201 were laundered through international treaties, obscuring the anticircumvention clause's domestic origins. Further, we conclude that the exemption proceeding is constructed not to protect noninfringing users, but to limit courts' ability to exonerate them via the traditional defenses to copyright infringement.*

*We then conduct a content analysis of the first two proceedings, conducted in 2000 and 2003. Exemption proponents generally interpret the law's intent in terms of policy goals such as fair use, whereas opponents see jurisdictional, procedural, and definitional obstacles to the granting of exemptions. The Register of Copyrights' interpretation of the law closely resembles that of opponents and, on more than one key point, she refers proponents back to Congress. We conclude that the Register has constructed a venue that is hostile to the interests of noninfringing users; in light of congressional rhetoric to the contrary, this constructs a Catch-22 for many who earnestly wish to engage in otherwise legal activities.*

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## I. INTRODUCTION

In the decade preceding widespread adoption of the Internet, copyright law was of limited interest to the general public; today, however, copyright debates have punctured "the bubble of public consciousness and become important global policy questions."<sup>1</sup> As

<sup>1</sup> Siva Vaidhyanathan, *The State of Copyright Activism*, 9 FIRST MONDAY n. 4, ¶ 1 (April, 2004), [http://firstmonday.org/issues/issue9\\_4/siva/index.html](http://firstmonday.org/issues/issue9_4/siva/index.html).

in the past, this upswing in copyright's visibility comes largely in the wake of a disruptive technology. While Napster played a vital role in bringing these issues to light,<sup>2</sup> and the attending *MGM v. Grokster*<sup>3</sup> decision has received much press, the Digital Millennium Copyright Act (DMCA)<sup>4</sup> is more likely to have a profound, lasting impact on the development and use of copyrighted content and technology in the coming century. Thus far, it has been the most important of the few dozen amendments to the Copyright Act of 1976.<sup>5</sup> The most important section of the DMCA is the ban on the circumvention of technological protection measures (TPMs) of digital content,<sup>6</sup> embodied in § 1201.<sup>7</sup>

The statute enacts three separate anticircumvention bans. The basic ban prohibits circumventing a TPM to gain unauthorized access to copyrighted works.<sup>8</sup> The other two bans are on trafficking in tools that effectuate the circumvention of a TPM that controls access to works<sup>9</sup> or limits certain uses (e.g., copying).<sup>10</sup> While there are statutory exemptions from one, two, or all three prohibitions,<sup>11</sup> the traditional defenses to charges of infringement, including fair use,<sup>12</sup> do not apply. Instead, the bill establishes a triennial assessment of the impact of the basic ban on the users of copyrighted works, giving the Librarian of Congress—

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<sup>2</sup> See Matt Jackson, *Using Technology to Circumvent the Law: The DMCA's Push to Privatize Copyright*, 23 HASTINGS COMM. & ENT. L.J. 607, 609 (2001). See generally Tom McCourt & Patrick Burkart, *When Creators, Corporations and Consumers Collide: Napster and the Development of On-line Music Distribution*, 25 MEDIA, CULTURE AND SOC'Y, 333, 333-50 (2003).

<sup>3</sup> *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005).

<sup>4</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.) [hereinafter D.M.C.A.].

<sup>5</sup> See David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. COPYRIGHT SOC'Y U.S. 401, 402 (1999).

<sup>6</sup> David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 675 (2000). We acknowledge that the phrase "Digital Rights Management," or DRM, is more commonly used than is TPM. We are reluctant to embrace the term DRM, however, since it begs the question of whether copyright holders are protecting something to which they have a legal right of monopoly. We therefore embrace a less commonly used—but less loaded—term to describe the same concept. An additional argument suggests that DRM controls far more than initial access and copying, but all manners of access, use, and purchase of cultural materials. See, e.g., Tarlton Gillespie, *Copyright and Commerce: The DMCA, Trusted Systems, and the Stabilization of Distribution*, 20 THE INFO. SOC'Y 239, 243-45 (2004) (discussing how the plans of DRM schemes such as "trusted" devices involve a total lockdown of all uses of media content); see also Julie Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089 (1998) (discussing how copyright holders use technology to help themselves to more protection than traditional copyright law).

<sup>7</sup> 17 U.S.C. § 1201 (2000).

<sup>8</sup> *Id.* § 1201(a)(1)(A).

<sup>9</sup> *Id.* § 1201(a)(2).

<sup>10</sup> *Id.* § 1201(b).

<sup>11</sup> *Id.* § 1201(e).

<sup>12</sup> 17 U.S.C. § 107 (2004).

upon the recommendations of the Register of Copyrights—the power to grant three-year exemptions to the basic ban.<sup>13</sup> An assessment of the legislative origins and inner workings of this process is the focus of this paper.

To facilitate this determination, the Register conducts a rulemaking to consider whether any exemptions to the basic ban are appropriate and what those should be.<sup>14</sup> This is a significant deviation from the previous role of Copyright Office rulings, which have historically considered only technical matters,<sup>15</sup> leaving interpretation of issues such as fair use to the courts.<sup>16</sup> An analysis of these hearings should help to illustrate the ways in which policy actors attempt to shape the experience of law outside the traditional venues in which the copyright bargain has been negotiated in the past.<sup>17</sup>

In this paper, we review the legislative history of § 1201 generally and the triennial rulemaking procedure specifically. We conclude that the rulemaking is best conceptualized as a vehicle for reducing the role of the courts—and of fair use—in the digital millennium. We also report the results of a content analysis of the stakeholder input provided in response to the solicitations for testimony and initial rulings as well as the final rulings. While this rich data set could be examined from a number of vantage points, we focus our analysis on the lively debates regarding legislative intent and the rules of the game in this new venue. Due to the novelty of these proceedings, and the importance of these rules to the determination of policy outcomes, many of these issues are still up for debate. This content analysis further buttresses our reading of the legislative history: the rulemaking procedure does not appear to be an earnest attempt to provide meaningful relief to adversely affected noninfringing users.

In Part II, we combine the literatures on political agendas, policymaking institutions and venue shifting, and theories of delegation as a basis for examining the instant case. In Part III, we discuss the legislative history of § 1201 specifically. While at least

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<sup>13</sup> 17 U.S.C. § 1201(a)(1)(C) (2004).

<sup>14</sup> *See, e.g.*, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Notice of Inquiry, 57 Fed. Reg. 63,578 (Oct. 15, 2002). This hearing process only determines exemptions to the basic ban; the only exemptions to the two trafficking bans are permanently enshrined in the statute, as discussed below.

<sup>15</sup> Nimmer, *supra* note 6, at 697.

<sup>16</sup> *Id.* at 696.

<sup>17</sup> JESSICA LITMAN, DIGITAL COPYRIGHT 57-63 (2001).

two noted authors did so in advance of the first rulemaking,<sup>18</sup> we provide further detail on both the legislative history generally and the triennial rulemaking procedure specifically. In Part IV, we present the results of an empirical content analysis of written submissions, oral testimony, and the final rulings, focusing especially on discourse about the rules of the game; to our knowledge, nothing like this project has been published to date.<sup>19</sup> Finally, in Part V, we draw conclusions about the impact of this strategic venue shift on the public interests associated with fair use.

## II. POLICY FORMATION AND CHANGE

Frank Baumgartner and Bryan Jones, in an attempt to understand the ways in which power and influence over the public policy process has been exercised, have explored the ways in which public policy agendas have shifted over time. They have paid particular attention the role that ideas and the articulation of those ideas have played in the periodic rise and fall of support for policies and practices on the national agenda.<sup>20</sup>

Among the insights we derived from their work is that the institutional structure of the policy process, not unlike the structure of the capitalist market, is shaped by the presence of monopoly power. While these “policy monopolies” are unstable, as a pluralist version of democratic theory would demand, understanding the ways in which these monopolies rise and fall in response to other changes in the socio-technical system<sup>21</sup> is part of

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<sup>18</sup> Nimmer, *supra* note 6; Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 415-26 (1999).

<sup>19</sup> The only study we have discovered that even takes the triennial rulemaking as its primary object of study is Woodrow Neal Hartzog, *Falling on Deaf Ears: Is the “Fail-Safe” Triennial Exemption Provision in the Digital Millennium Copyright Act Effective In Protecting Fair Use?*, 12 J. INTELL. PROP. L. 309 (2005). While Hartzog’s reasoned analysis of the proceedings’ inefficacy is fairly on-point, his article, like any first, leaves much to say on the subject. It provides little discussion of the political process that led to the triennial proceedings—a peculiar shift of venue that we discuss in moderate detail. By Hartzog’s own admission, he does little to dissect the reasoning behind specific exemptions, and even less to dissect the reasoning behind specific denials of requests for exemptions. *See id.* at 329. We examine this reasoning somewhat more fully, while acknowledging that the 2003 Recommendation of the Register of Copyrights alone is 198 pages long. The starkest difference between Hartzog’s paper and ours, however, is the relative detail with which each discusses the written and oral testimony. Hartzog cites just three such documents. We conducted computer-aided searches of 466 documents, and we manually coded 110 of those; witness testimony made up the vast majority. By comparing and contrasting this testimony with the final rulings, we believe that our systematic investigation offers unique insight into the hearings.

<sup>20</sup> *See generally* FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (1993).

<sup>21</sup> This is a reference to theoretical developments in the analysis of long-term social change derived from the insights of Joseph Schumpeter. *See* PASCHAL PRESTON, *RESHAPING COMMUNICATIONS* 124-32 (2001).

the challenge that Baumgartner and Jones help us to meet.

Among the most important insights that we have derived from this work is the fact that policy entrepreneurs tend to seek out alternative venues within the policy environment in which they believe that a competitive policy frame can be established as the basis for a swing in the direction of preferred policy alternatives.<sup>22</sup> We believe that the same processes and strategic moves that Baumgartner and Jones observed with regard to a broad range of problems and socio-technical systems can be observed with regard to the so-called “digital dilemma” of intellectual property,<sup>23</sup> not least of all because of the unusual shift of venue from the Legislature and the courts to the Library of Congress in dealing with these issues.

### A. *Agendas*

A central goal of a policy management initiative is the establishment of a rank-ordered set of priorities or concerns. Setting the policy agenda is the equivalent of setting the terms of debate in ways that privilege one side and burden the other. The identification of the most important parties, institutions, or values at risk, or the benefits to be achieved, is the first priority of a policy entrepreneur. A critical aspect of the struggle to establish the policy agenda is the characterization of interested parties or stakeholders. The list of stakeholders who have been identified as having common or competing interests in the outcome of contemporary debates about intellectual property in a digital age<sup>24</sup> is far more extensive than one might infer from the list of issues and concerns that have been discussed in Congress and the mainstream press.

It is important to distinguish between the interests and concerns of those we might identify as the “creators of intellectual property” and those whose wellbeing is tied up in its distribution and sale. There are also significant differences among those whom we might identify as users of intellectual property and their agents.

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<sup>22</sup> BAUMGARTNER & JONES, *supra* note 20, at 237-43; *see also* Hernan Galperin, *Beyond Interests, Ideas and Technology: An Institutional Approach to Communication and Information Policy*, 20 THE INFO. SOC'Y 159, 162-64 (2004) (discussing the conceptual framework of new institutionalist analysis and its applicability in the analysis of telecommunications and media governance); Ian Hosein, *The Sources of Laws: Policy Dynamics in a Digital and Terrorized World*, 20 THE INFO. SOC'Y 187, 188 (2004) (discussing international policy dynamics).

<sup>23</sup> COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS AND THE EMERGING INFORMATION INFRASTRUCTURE, NATIONAL RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 318-21 (2000) [hereinafter DIGITAL DILEMMA].

<sup>24</sup> *Id.* at 65-75.

The interests of the general public are rather poorly defined, and until quite recently these interests were assumed to have been represented by the members of the academic community, librarians, or coalitions of consumer equipment manufacturers.<sup>25</sup> Although the growth in the number of public interest organizations concerned with communications and information policies has been substantial, it has leveled off, rather than increased during the period of critical policy change we associate with the rise of the internet.<sup>26</sup> What has changed, however, is the tendency of these organizations to be concerned more with economic aspects of policy than with traditional concerns about content and representation.<sup>27</sup>

It is also important, for strategic reasons, to be able to characterize the interests of some stakeholders as being illegitimate, or as unworthy of serious consideration. Such an approach is common within policy debates where the interests of individuals are to be balanced against some constructions of “the common good.”<sup>28</sup> Of course, it is not only the stakeholders and their characterizations that determine the character of policy debates and their ultimate consequences; it also matters where these debates unfold.<sup>29</sup>

### B. *Institutional Arrangements*

Baumgartner and Jones suggest that policymakers not only attempt to frame issues and set the agendas for action, but they also seek to influence the selection of venues in which those issues will be debated.<sup>30</sup> Policy actors have an incentive to move policy debates to those arenas in which they can exercise a competitive advantage that they may have developed or can expect to acquire, perhaps with the assistance of an emerging coalition of interested parties. Coalition members may engage actively in “venue shopping” as a matter of political strategy, or in response to altered conceptualization of the interests at stake.<sup>31</sup>

There is yet another strategy that may govern the emergence

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<sup>25</sup> LITMAN, *supra* note 17, at 124.

<sup>26</sup> Milton Meuller et al., *Civil Society and the Shaping of Communication-Information Policy: Four Decades of Advocacy*, 20 THE INFO. SOC'Y. 169, 177 (2004).

<sup>27</sup> *Id.* at 183.

<sup>28</sup> AMAITAI ETZIONI, THE LIMITS OF PRIVACY 4 (1999).

<sup>29</sup> See, e.g., HERNAN GALPERIN, NEW TELEVISION, OLD POLITICS 251 (2004) (discussing the ways in which the structural features of policy environments shape the opportunities for the exercise of power).

<sup>30</sup> BAUMGARTNER & JONES, *supra* note 20, at 35.

<sup>31</sup> See generally Sarah Pralle, *Venue Shopping, Political Strategy, and Policy Change: The Internationalization of Canadian Forest Advocacy*, 23 J. PUB. POL'Y 233-60 (2003).

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of policy venues in ways designed to hide exercise of power and influence. “Policy laundering” is a term that describes efforts by policy actors to have policy initiatives seen as exogenously determined, or even seen as requirements imposed by powerful others. The United States and the United Kingdom are identified as policy actors that routinely push for the establishment of regulatory standards in international policy venues so that domestic policies can be brought into line with those policies “under the requirement of harmonization and the guise of multilateralism.”<sup>32</sup>

Members of the copyright industries, especially the music, motion picture, and software industries, have long exercised considerable power within the traditional domains of copyright policymaking: Congress and the Copyright Office.<sup>33</sup> The recent involvement of additional stakeholders, including consumers and their advocates, has led industry actors to seek additional venues where their influence is also likely to be substantial.<sup>34</sup> The increasing significance of the international policy arena, including the World Intellectual Property Organization (WIPO), has increased the number and value of new policy venues that are available to advocates of strong copyright laws.<sup>35</sup> We discuss the relationship between these venues and the DMCA in further detail below.

### C. *Theories of Delegation*

While it is difficult to determine precisely why a legislature may delegate responsibility to an agency,<sup>36</sup> Hazlett and Spitzer offer a number of worthwhile theories. They include: “[d]elegation as an efficient and expert pursuit of the public interest,”<sup>37</sup> which trusts agencies to solve complex policy issues and future political developments. “Delegation as an aid to rent extraction”<sup>38</sup> implies that politicians use regulation either as a tool

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<sup>32</sup> Hosein, *supra* note 22, at 189.

<sup>33</sup> LITMAN, *supra* note 17, at 138.

<sup>34</sup> *Id.* at 144. LITMAN suggests that the assignment of rulemaking responsibility to the “Librarian of Congress in consultation with the Copyright Office and the Commerce Department” would preserve both “Commerce and Judiciary Committee jurisdiction and the associated generous campaign contributions.” *Id.*

<sup>35</sup> See David Bach, *The Double Punch of Law and Technology: Fighting Music Piracy or Remaking Copyright in a Digital Age?* 6 BUS. & POL., 18, 18-22 (2004), available at <http://www.bepress.com/bap/vol6/iss2/art3> (discussing international venue shopping).

<sup>36</sup> Mark A. Pollack, *Learning from the Americanists (Again): Theory and Method in the Study of Delegation*, 25 W. EUR. POL., 200, 216 (2002).

<sup>37</sup> Thomas W. Hazlett & Matthew L. Spitzer, *Digital Television and the Quid Pro Quo*, 2 BUS. & POL., 135 (2000), available at <http://www.bepress.com/bap/vol2/iss2/art2>.

<sup>38</sup> *Id.* at 136.



to create rents or as a threat with which to extract rents (in the form of contributions). Further, delegation can assist in “solving the collective action problem in Congress,”<sup>39</sup> because Congressional decision-making is inefficient, especially as a means of writing detailed legislation. Yet opting for the simpler route of delegation may lead to runaway agency policymaking.<sup>40</sup> One final reason for delegation is to facilitate “credit claiming and blame shirking.”<sup>41</sup> This most clearly comes into play when the interests of those who gain from the policy enacted via delegation are concentrated, but the interests of those who lose from the same policy are diffuse.

Hazlett & Spitzer illustrate credit claiming and blame shirking by using this theory to explain continued Congressional delegation of the power to regulate broadcasters to the FCC, even though the Commission is “universally held to have failed to deliver the positive side of the bargain with the public.”<sup>42</sup> Broadcasters have very clear, powerful, and concentrated interests in retaining a system that purports to extract broadcast programming with strong public service components, fails to extract it, and yet continues to deliver free monopoly licenses to broadcasters. Congress can therefore publicly flog the FCC for failing to do its job—shirking public blame—and yet quietly claim political credit with broadcasters who better understand Congress’s role.<sup>43</sup> If conducted to facilitate credit claiming and blame shirking, delegation is a homegrown means of effecting policy laundering; members of Congress can launder their choices through another government organ, hiding this from the broader public but cashing in goodwill with concentrated political interests.

### III. THE PATH TO § 1201

The route to the final version of § 1201 is worth recounting because this history reveals a great deal about how we arrived at the final product. Much of the debate in the first two exemption proceedings revolved around legislative intent. One side insisted that the proceedings are designed primarily to preserve any reasonably constructed fair use claims, while the other envisioned them as, at best, a solution to a medium-specific worst-case scenario

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<sup>39</sup> *Id.*

<sup>40</sup> DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS: A TRANSACTION COST, POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 49 (1999).

<sup>41</sup> Hazlett & Spitzer, *supra* note 37, at 140.

<sup>42</sup> *Id.* at 141.

<sup>43</sup> *Id.* at 142.

designed only to ameliorate the worst pay-per-use scenarios. It is only in understanding the political push behind the legislation generally, and the exemption proceeding specifically, that we can begin to make sense of the proceedings' inner workings.

In the first, briefest subsection, we discuss the internationalized push for reform by Patent Commissioner Bruce A. Lehman; this push demonstrates the interplay of venues and sets up the mechanics of the policy laundering that followed. Second, we detail the bill as originally proposed, including a somewhat fuller discussion of the three bans. Third, we examine the two House subcommittee hearings that followed; they speak loudly to the means by which Congress crafts copyright law. Fourth, we consider the evolving versions of § 1201. Finally, we discuss the legislative history of the triennial proceedings established to determine exemptions to the basic ban.

#### A. *Lehman's (Shopping) Wish List*

Shortly after President Clinton's inauguration, Commissioner Lehman began working to deliver as much legal control as possible over digital content to copyright holders.<sup>44</sup> Yet resistance quickly grew in Congress, thanks largely to the lobbying effort of groups such as the Digital Future Coalition.<sup>45</sup> During this time, Lehman was also trying to build international support for a treaty that could leverage stricter copyright law into the rest of the world's law books.<sup>46</sup>

The domestic legislation, however, was not moving. The commissioner, therefore, decided to attack the problem the other way around. He focused his attention on getting his agenda adopted by the WIPO member nations, reasoning that when the United States signed the treaty, Congress would be obliged to adopt implementing legislation . . . .<sup>47</sup>

In the end, even though the final language of the WIPO Copyright Treaty<sup>48</sup> (WCT) was much weaker than Lehman had hoped,<sup>49</sup> it contained a new anticircumvention provision that was "used as a basis for greatly enhanced copyright owner control."<sup>50</sup> The Treaty

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<sup>44</sup> LITMAN, *supra* note 17, at 90-91.

<sup>45</sup> *Id.* at 124-25.

<sup>46</sup> *Id.* at 129.

<sup>47</sup> *Id.*

<sup>48</sup> WIPO Copyright Treaty, adopted by the Diplomatic Conference on Dec. 20, 1996, WIPO Doc. CRNR/DC/94 (Dec. 23, 1996).

<sup>49</sup> LITMAN, *supra* note 17, at 129.

<sup>50</sup> *Id.* at 131.

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requires that countries have “adequate legal protection and effective legal remedies against the circumvention of effective technological measures,”<sup>51</sup> but U.S. law arguably met this standard. It was already illegal to circumvent TPMs if conducted as part of a copyright infringement, and manufacturers of “black box” devices that only served to circumvent TPMs had already been subjected to legal liability for facilitating infringement.<sup>52</sup> The “Clinton Administration initially considered whether the WIPO Copyright Treaty might even be sent to the Senate for ratification ‘clean’ of implementing legislation.”<sup>53</sup> Instead, Congress used the Treaty as an excuse to implement a much more sweeping ban on circumvention. In short, Lehman and the bill’s congressional supporters used WIPO to launder their own interests, running their political capital through the bank of international credibility and treating the final bill as something required by international law.

### B. *Original Bill*

Section 1201 implements three different bans. These three bans are the bulk of a much briefer section in the bill as introduced, and they find their way into the final version with only minor edits. The first ban (or the “basic ban”) prohibits circumventing a TPM to gain unauthorized access to copyrighted works. “No person shall circumvent a technological protection measure that effectively controls access to a work protected under this title.”<sup>54</sup> For example, it is a violation of this provision to defeat a software installer’s requirement for a unique serial number. While doing so for the purpose of infringing a copyright was already illegal, this clause bans it for any reason—even if one has misplaced the serial number for a legally purchased software package and intends to install it on just one computer.<sup>55</sup> Even a librarian who wants only to preserve a decaying digital artifact is prohibiting from circumventing an access-controlling TPM to do so.

The second ban prohibits manufacturing, importing, and trafficking in tools that would assist one in the type of behavior

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<sup>51</sup> WIPO Copyright Treaty, *supra* note 48, art. 11.

<sup>52</sup> LITMAN, *supra* note 17, at 131.

<sup>53</sup> Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 530 (1999).

<sup>54</sup> H.R. 2281, 105th Cong. § 1201(a)(1) (1997). The final version is codified at 17 U.S.C. § 1201(a)(1)(A) (2004), but it omits the word “protection.”

<sup>55</sup> The final statute offers a potential defense, 17 U.S.C. § 1201(f) (2004), which permits reverse engineering to achieve interoperability between software programs.

prohibited by the basic ban.<sup>56</sup> This ban (the “access trafficking ban”) prohibits computer-repair services from assisting a librarian in the above scenario, and it prohibits librarians from developing a technology to facilitate circumventions. The third ban (the “additional violations ban”) prohibits trafficking in tools to facilitate the circumvention of a TPM if that TPM protects *any* copyright holder’s rights, notably the exclusive right of reproduction.<sup>57</sup> An example of a technology that would violate this ban is a program that defeats a TPM that prevents the copying of some CDs; again, not even librarians can develop such a technology.

The difference between the two trafficking bans comes into play in the statutory exemptions—and in the circumventions that are not forbidden. Omitted from the statute is any ban on the circumvention of use control technologies, so long as those technologies are not “dual-purpose” in the sense of also controlling access. For instance, § 1201 does not ban the act of circumventing the copy-controls on a legally purchased CD, which leaves such behavior in the realm of prior statutory and case law. We refer to this as the “noninfringing use” exemption because one can legally circumvent use control technologies to engage in noninfringing uses, including fair uses. Yet such noninfringing uses are still difficult to achieve for most users, as it remains illegal to develop, sell, or market the tools to facilitate such circumvention. Even those who have the technical expertise to circumvent cannot circumvent dual-purpose technologies; for instance, because the DVD Content Scrambling System (CSS) has been found to be an access control technology,<sup>58</sup> one cannot circumvent CSS to make fair use of movie clips.

Other than these three bans, the original bill’s § 1201 has little to say. In a section that was ultimately removed, it would have made the importation of circumvention-facilitating technologies “actionable under section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337).”<sup>59</sup> The bill clarifies that it does not affect any of the “rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.”<sup>60</sup> This “savings

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<sup>56</sup> H.R. 2281, 105th Cong. § 1201(a)(2) (1997). The final version is codified at 17 U.S.C. § 1201(a)(2) (2004).

<sup>57</sup> H.R. 2281, 105th Cong. § § 1201(b)(1). The final version is codified 17 U.S.C. § 1201(b)(1) (2004).

<sup>58</sup> *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

<sup>59</sup> H.R. 2281, 105th Cong. § 1201(c) (1997).

<sup>60</sup> *Id.* at § 1201(d).

clause” makes it through to the final version.<sup>61</sup> The only statutory exemption in the bill is for “law enforcement and intelligence activities” by government agencies.<sup>62</sup>

### C. Congressional Hearings

In the two House Committee hearings to consider the legislation, the Act’s principal advocates engaged in substantial policy laundering. Additionally, witnesses all but explicitly agreed that the act was designed from the very beginning to benefit the copyright industries<sup>63</sup> (and, after substantial amendment, perhaps not to harm other industries too badly) at the public’s expense. The policy developments revealed in these hearings illustrate that, while systems matter, people acting within those systems also matter.

#### 1. Policy Laundering

As Litman notes, Commissioner Lehman and copyright owners were sorely disappointed with the final WCT’s relative weaknesses, but they were determined to use the treaty’s language as a platform for achieving significantly stronger copyright protections.<sup>64</sup> In House Judiciary subcommittee hearings,<sup>65</sup> no fewer than six witnesses insisted that the bill had to be adopted quickly in order to ensure the quick ratification and implementation of the treaty in other countries.<sup>66</sup> Four more witnesses made the same argument in House Commerce subcommittee hearings.<sup>67</sup> Lehman in particular used WIPO to

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<sup>61</sup> 17 U.S.C. § 1201(c)(1) (2004).

<sup>62</sup> H.R. 2281, 105th Cong. § 1201(3) (1997).

<sup>63</sup> The members of the copyright industries and the gross revenues reported by their individual sectors are identified in CONGRESSIONAL BUDGET OFFICE, U.S. CONGRESS, COPYRIGHT ISSUES IN DIGITAL MEDIA 4 (2004), available at <http://www.cba.gov/ftpdocs/57xx/doc5736/08-09Copyright.pdf>.

<sup>64</sup> LITMAN, *supra* note 17, at 129-30.

<sup>65</sup> *WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on Courts and Intell. Prop. of the House Comm. on the Judiciary*, 105th Cong. (1997) [hereinafter *Judiciary Hearing*].

<sup>66</sup> *Id.* at 34 (statement of Hon. Bruce A. Lehman, Assist. Sec. and Comm’r of Patents and Trademarks, Patent and Trademark Office, Dept. of Commerce); *id.* at 43 (statement of Hon. Marybeth Peters, Register of Copyrights, Copyright Office of the U.S.); *id.* at 78 (statement of Jack Valenti, President and C.E.O., Motion Picture Association of America); *id.* at 157 (statement of Allee Willis, songwriter, on behalf of Broadcast Music Inc.); *id.* at 212 (statement of Gail Markels, General Counsel and Senior Vice President, Interactive Digital Software Association.); *id.* at 218 (statement of Michael K. Kirk, Executive Director, American Intellectual Property Law Association).

<sup>67</sup> *The WIPO Copyright Treaties Implementation Act, Hearing on H.R. 2281 Before the Subcommittee on Telecomm., Trade, and Consumer Protection*, 105th Cong. 43 (1998) [hereinafter *Commerce Hearing*] (statements of Hillary B. Rosen, President & C.E.O., Recording Industry Association of America); *id.* at 50 (statement of George Vradenburg

justify a bill that clearly exceeds the treaties' requirements. "The legislation . . . is designed to permit us to adhere to these treaties and to exercise our appropriate leadership as the leading copyright producer in the world, in providing other countries with a model in about how they shall implement these treaties as well."<sup>68</sup> While questioning Lehman, Rep. Rick Boucher asked if the U.S. could meet its treaty obligations without banning technologies—whether the trafficking bans were unnecessary to meet the WIPO treaties. Lehman dodged the question, and Boucher again asked:

Could we meet those requirements by adopting a conduct oriented approach as opposed to a device oriented approach?  
MR. LEHMAN. In my personal view . . . the answer is yes. But in my personal view also that [sic] the value of the treaties would be reduced enormously, and we would be opening ourselves up to universal piracy of American products all over this planet.<sup>69</sup>

Several representatives joined Lehman in this laundering effort. In the Commerce Hearing, for instance, Rep. Bart Gordon insists, "once we pass something here, it has to go to the international community . . . . They are really waiting for us to see what we are going to do. So whatever we do is the ceiling, not the floor."<sup>70</sup> This statement implicitly acknowledged what Boucher made Lehman say explicitly: the treaty—the "floor"—does not require such strong bans. One opponent, Edward J. Black, the President of the Computer and Communications Industry Association (CCIA), inverted the same arguments:

[T]he administration's bill does not represent a compromise position. It was rejected . . . in WIPO, and we believe that it is important that legislation implementing WIPO reflect what really happened in WIPO. That is important. It is a precedent to the rest of the world with regard to the protection of intellectual property not to have people try to twist and distort what was done.<sup>71</sup>

On both sides of the debate, then, stakeholders agreed that the bill exceeded the treaty obligations and that the example we set

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III, Senior Vice President and General Counsel, America Online, Inc., on behalf of the Ad Hoc Copyright Coalition); *id.* at 53 (statement of Steven J. Metalitz, Smith & Metalitz, L.L.P., on behalf of the Motion Picture Association of America); *id.* at 37 (prepared statement of Robert W. Holleyman II, President and C.E.O., Business Software Alliance).

<sup>68</sup> *Judiciary Hearing*, *supra* note 65, at 34 (statement of Hon. Bruce Lehman). R

<sup>69</sup> *Id.* at 62 (statement of Hon. Bruce Lehman). R

<sup>70</sup> *Commerce Hearing*, *supra* note 67, at 8 (statement of Hon. Bart Gordon, Member, House Comm. on Commerce). R

<sup>71</sup> *Judiciary Hearing*, *supra* note 65, at 257 (statement of Edward J. Black, President, Computer and Communications Industry Association). R

would have international ramifications; the disagreement was whether that was for better or for worse. This was naked policy laundering. It was also a demonstration of especially effective venue shifting. Having failed at the original strategy of securing domestic legislation, the bill's allies devised a very effective solution: work an international venue for as strict a treaty as possible, and failing to achieve much there, push domestically in the name of international compliance. In other words, shift venues, obscure the relative failure there, launder one's interests through the bank of international credibility, and push again in the original venue.<sup>72</sup>

## 2. Industrial Over Public Interest

In addition to this fairly explicit display of policy laundering, the path to § 1201 demonstrates Litman's observation that copyright law is developed primarily to benefit powerful vested interests.<sup>73</sup> Each Subcommittee's witness list helps illustrate this claim. The Judiciary Hearing featured twenty-five witnesses,<sup>74</sup> and the Commerce Hearing featured twelve.<sup>75</sup> In total, nine represented media industries such as music (6), movies (2), and publishing (1). A total of fifteen witnesses represented miscellaneous high-technology sectors; this included TPM vendors (1), Internet Service Providers (1), webcasters (1), software firms (6), hardware manufacturers (1), and companies or associations in both software and hardware (5). Telecommunications (4) and higher education (5) were also represented, as were intellectual property attorneys (1). These stakeholders represented most of the categories of participants that we identify in the triennial rulemaking. One highly noteworthy exception, however, was the general public: while ordinary consumers and unaffiliated advanced computer users represented the greatest single group of participants in the exemption proceedings, they had no direct say in the congressional hearings.

In contrast to thirty-four industry representatives, there were, at best, three government or civil society advocates of the public interest:<sup>76</sup> Patent Commissioner Bruce A. Lehman,<sup>77</sup> Register of

<sup>72</sup> While this is beyond our scope here, we believe the cycle continues as the treaty is interpreted abroad. Rep. Gordon in particular alluded to the premeditated strategy of interpreting the WIPO treaties through § 1201 in the push for strict anticircumvention statutes in other countries. *Commerce Hearing, supra* note 67, at 8.

<sup>73</sup> LITMAN, *supra* note 17, at 23.

<sup>74</sup> *Judiciary Hearing, supra* note 65, at iii.

<sup>75</sup> *Commerce Hearing, supra* note 67, at iii.

<sup>76</sup> Two witnesses in the Judiciary Hearing who offered some voice to civil society

Copyrights Marybeth Peters,<sup>78</sup> and Director of the Electronic Privacy Information Center (EPIC) Marc Rotenberg.<sup>79</sup> Lehman entered WIPO negotiations hoping to bring home something akin to H.R. 2281, and having failed at that, he used the WCT as a rhetorical vehicle for a much more sweeping bill.<sup>80</sup> Peters was comparatively neutral, a point we will return to later, but she provided little if any evaluation of the bill's ability to meet the public interest. Rotenberg, the only person who actually devoted his entire testimony to a consideration of the public interest, testified exclusively on the need for privacy safeguards in the legislation.<sup>81</sup>

In addition to the witness list, the explicit compromise between telecommunications and media interests makes clear that this bill was for these industries' benefit. Of twenty-five Judiciary witnesses, eighteen testified partially or entirely on H.R. 2281; the other seven testified exclusively on H.R. 2180,<sup>82</sup> the Online Copyright Liability Limitation Act. The latter bill limited the liability of those who transmit data across networks, especially internet service providers (ISPs), for copyright infringements until and unless they are notified of such infringement. Bundling these two acts together was something of a forced compromise. Telecommunications and some technology companies were willing to support H.R. 2281 in exchange for 2180's assurances that they would not be sued for their own behavior or that of their customers,<sup>83</sup> and copyright interests were generally more

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interestswere Earlham College President Douglas Bennett, and Computer and Communications Industry Association President Edward J. Black, Both were also speaking on behalf of the Digital Future Coalition, which includes civil society nonprofits. Yet Bennett and Black were not there purely out of selfless devotion to the public interest. Representing educators and computer manufacturers, respectively, each had a clear vested interest in keeping copyright law from becoming too cumbersome upon their industries. Each therefore had at least some incentive to make a deal with copyright owners featuring concessions that were specific to users such as computer engineers and librarians. While we impugn neither Bennett nor Black specifically, we note that these industries did receive concessions in the final legislation. *Judiciary Hearing, supra* note 65, at 240, 256.

<sup>77</sup> *Judiciary Hearing, supra* note 65, at 34 (statement of Hon. Bruce Lehman). R

<sup>78</sup> *Id.* at 43 (statement of Hon. Marybeth Peters). R

<sup>79</sup> *Commerce Hearing, supra* note 67, at 12 (statement of Marc Rotenberg, Director, Electronic Privacy and Information Center). R

<sup>80</sup> *See infra* Part III A.

<sup>81</sup> *Commerce Hearing, supra* note 67, at 12 (statement of Marc Rotenberg). R

<sup>82</sup> H.R. 2180, 105th Cong. (1997). The essence of this bill is tacked on as Title II of H.R. 2281, 105th Cong. (1997).

<sup>83</sup> *E.g., Judiciary Hearing, supra* note 65, at 83 (statement of Roy Neel, Pres., United States Telecom Association) (arguing, in part that "[y]ou have to keep this liability issue coupled with the treaty implementation process, otherwise there is no incentive whatsoever for the content community to come to the table under your guidance and work out a solution here."). R



interested in preventing TPM circumvention.<sup>84</sup> Of the eighteen who testified on H.R. 2281, thirteen were clearly in favor of the bill (with occasional suggestions for minor amendments),<sup>85</sup> and only five offered opposition or insisted on substantial amendments prior to passage.<sup>86</sup> Of the other seven, five testified on behalf of H.R. 2180,<sup>87</sup> and two witnesses representing copyright holders<sup>88</sup> opposed it. Nobody got exactly what she wanted, but taken together, the bill gave two major industries that which they desired most strongly.

In their Commerce Hearing testimony, several witnesses alluded to or explicitly stated that the legislative compromises thus far represented the tradeoff between still additional industries' interests. Several witnesses preferred the Senate's amended bill,<sup>89</sup> which incorporated an exemption to protect the right to reverse-engineer software programs.<sup>90</sup> Chris Byrne insisted that the House adopt the amendments incorporated into the Senate version<sup>91</sup> so that information technology companies could "keep the lawyers out of the R&D labs."<sup>92</sup> Walter H. Hinton commended the Senate

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<sup>84</sup> *E.g.*, *id.* at 129 (statement of Lawrence Kenswil, Executive Vice President, Universal Music Group) ("If this committee concludes that [H.R. 2180] is necessary, I urge you to include incentives to ensure that those who link consumers to our music support copy control technology.").

<sup>85</sup> *Id.* at 34 (statement of Hon. Bruce Lehman); *id.* at 43 (statement of Hon. Marybeth Peters); *id.* at 68 (statement of Robert W. Holleyman II); *id.* at 78 (statement of Jack Valenti, President & C.E.O., Motion Picture Association of America); *id.* at 156 (statement of Allee Willis); *id.* at 167 (statement of John Bettis, songwriter, on behalf of American Society of Composers, Authors and Publishers); *id.* at 198 (statement of Johnny Cash, vocal artist); *id.* at 200 (statement of Hilary B. Rosen, President and C.E.O., Recording Industry Association of America); *id.* at 204 (statement of Allan R. Adler, Vice President for Legal and Government Affairs, Association of American Publishers); *id.* at 212 (statement of Gail Markels, General Counsel and Senior Vice President, Interactive Digital Software Association); *id.* at 218 (statement of Michael K. Kirk), 224 (statement of Thomas Ryan, C.E.O., SciTech Software); *id.* at 271 (statement of Mark S. Belinsky, Vice President, Copy Protection Group, Macrovision Corp.).

<sup>86</sup> *Id.* at 64 (statement of M.R.C. Greenwood, Chancellor, University of California Santa Cruz); *id.* at 240 (statement of Douglas Bennett); *id.* at 249 (statement of Christopher Byrne, Director of Intellectual Property, Silicon Graphics); *id.* at 256 (statement of Edward J. Black); *id.* at 266 (statement of Gary J. Shapiro, President, Consumer Electronics Manufacturers Association).

<sup>87</sup> *Id.* at 82 (statement of Roy Neel, President & C.E.O., United States Telecom Association); *id.* at 113 (statement of Tushar Patel, Vice President and Managing Director, US WEB); *id.* at 122 (statement of Marc Jacobsen, Vice President and General Counsel, Prodigy Services Inc.); *id.* at 148 (Statement of Robert L. Oakley, Professor of Law, Georgetown University Law Center); *id.* at 172 (statement of Ronald G. Dunn, President, Information Industry Association).

<sup>88</sup> *Id.* at 116 (statement of Ken Wasch, President, Software Publishers Association); *id.* at 128 (statement of Lawrence Kenswil, Executive Vice President, Business and Legal Affairs, Universal Music Group).

<sup>89</sup> S. 2037, 105th Cong. (1998); *see also* S. REP. NO. 105-190 (1998).

<sup>90</sup> S. 2037, 105th Cong. § 1201(g); *see also* S. REP. NO. 105-190, at 88.

<sup>91</sup> *Commerce Hearing*, *supra* note 67, at 34 (prepared statement of Chris Byrne).

<sup>92</sup> *Id.* at 31 (statement of Chris Byrne).

bill's "compromise position on reverse engineering that CCIA negotiated with the Business Software Alliance . . . . This represents a fair and balanced solution that required long hours of intense negotiations."<sup>93</sup> George Vradenburg III also heaped praise upon the Senate compromise, which incorporated limitations on internet service providers' liability that were similar to those found in H.R. 2180.<sup>94</sup> "The product of two years of effort and conversations between the copyright community on the one hand and the Internet community on the other, it is in fact a delicate balance of what are strongly contending forces, but nevertheless, now cooperative forces in how to build out the Internet."<sup>95</sup> These statements support Litman's observation that industry players hash out copyright legislation among themselves; they even suggest that, since the negotiations are largely done, Congress just has to sign on the dotted line.

### 3. Policy Actors

The behavior of almost all of these witnesses is fully predictable. Educators, ISPs, and non-software technology firms want less liability for copyright infringement; software and media interests want more. A few political actors, however, can make a significant difference. Three are worth noting: Lehman, Peters, and Boucher. Commissioner Lehman was a powerful ally for those who support H.R. 2281; we have already discussed his international push for the bill.

Representative Boucher was among the original bill's most vocal opponents, and as the only member of both subcommittees, he was uniquely placed to lodge that opposition. In the Judiciary Hearing, Subcommittee Chairman Coble, who sponsored the bill,<sup>96</sup> attempted at the beginning of each day to minimize the number of opening statements. In both instances, Boucher insisted on beginning each day's proceedings with an opening statement that raises serious doubts about the bill.<sup>97</sup> In his statement to begin the second day, Boucher insisted that the WIPO treaties did not require the bill's trafficking bans, and he expressed concerns that the bill would chill the development of new

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<sup>93</sup> *Id.* at 49 (statement of Walter H. Hinton, Vice President, Strategy and Marketing, Storage Technology Corp., on behalf of the Computer and Comm'c. Indus. Ass'n).

<sup>94</sup> *See* S. REP. NO. 105-190, at 78.

<sup>95</sup> *Id.* at 50 (statement of George Vradenburg III).

<sup>96</sup> H.R. 2281, 105th Cong. (1998).

<sup>97</sup> *Judiciary Hearing*, *supra* note 65, at 27, 191 (statements of Hon. Rick Boucher, Member, House Comm. on Judiciary).

technologies and the exercise of fair use.<sup>98</sup> Boucher's most remarkable maneuver, however, was the introduction of a competing bill, H.R. 3048,<sup>99</sup> which drew fifty-three cosponsors. This bill's anticircumvention provision read as follows:

No person, for the purpose of facilitating or engaging in an act of infringement, shall engage in conduct so as knowingly to remove, deactivate or otherwise circumvent the application or operation of any effective technological measure used by a copyright owner to preclude or limit reproduction of a work or a portion thereof. As used in this subsection, the term 'conduct' does not include manufacturing, importing or distributing a device or a computer program.<sup>100</sup>

This alternative tied the basic ban to copyright infringement, and it explicitly precluded any ban on trafficking in circumvention devices. While the final language of H.R. 2281 changed little in this direction, Boucher's alternative gave significant rhetorical leverage to those who opposed 2281's sweeping language.<sup>101</sup> We believe this facilitates the addition of several statutory exemptions and the triennial rulemaking process.

In addition to Lehman and Boucher, we consider one final policy actor: Register of Copyrights Marybeth Peters. Peters' congressional testimony is of particular value in understanding the triennial proceedings that she eventually came to administer. In her testimony, Peters hinted at the degree to which she did not speak for the public. Litman notes that this is, in principle, her job. "Unfortunately, the Copyright Office has tended to view copyright owners as its real constituency, and has spent the past ten years moving firmly into the content industry's pocket. . . . [T]he Register has routinely given positions advanced by the content industry her enthusiastic endorsement."<sup>102</sup> On the whole, Peters' testimony met this general prediction. Her position on the bill was very supportive. "The Copyright Office urges prompt ratification of these treaties, and supports H.R. 2281 generally. In our view the bill fully and adequately implements the obligations of the treaties, without amending the law in areas where a change is not required

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<sup>98</sup> *Id.* at 192.

<sup>99</sup> H.R. 3048, 105th Cong. (1997).

<sup>100</sup> *Id.* § 1201(a).

<sup>101</sup> *E.g., Commerce Hearing, supra* note 67, at 46 (statement of Walter H. Hinton) ("First, I would like to take the opportunity to express my appreciation to Congressman Rick Boucher who, along with Congressman Tom Campbell, had the vision to introduce H.R. 3048 as an alternative to H.R. 2281. The Boucher bill represents a thoughtful and intelligent approach . . .").

<sup>102</sup> LITMAN, *supra* note 17, at 74.

for implementation.”<sup>103</sup>

Despite this general enthusiasm, she was less of an unabashed cheerleader than Lehman. She testified that her office’s overall support “does not mean that we see the language of these provisions as perfect. . . . The anti-circumvention provision in particular has raised concerns as to its scope and impact, and may need further refinement. On this and other issues we remain willing to assist the Committee.”<sup>104</sup> Peters also provided an in-depth discussion of common concerns with the bill. While insisting that the bans on circumvention technologies were necessary for the bill to be effective, she clearly stated that they were not *per se* required by the WCT and that she would have been happy to offer guidance on how to reduce the statute’s potential impact on socially desirable products.<sup>105</sup> She also provided an in-depth discussion of the bill’s “potential impact on fair use interests.”<sup>106</sup>

Cautious tone aside, however, Peters clearly used her position to support the bill as written. In her written statement, she argued that the bill preserved fair use in two ways. “First, it . . . does not contain a prohibition against individual acts of circumvention of”<sup>107</sup> use-controlling TPMs. “Section 1201 has therefore been analogized to the equivalent of a law against breaking and entering. Under existing law, it is not permissible to break into a locked room in order to make fair use of a manuscript kept inside.”<sup>108</sup> Yet Peters acknowledged that the bill could foster business models predicated on forcing customers through access controls in order to make any uses, denying them the capacity to make fair uses, and distributing certain works only in encrypted electronic formats.<sup>109</sup> She admitted that the law may place technologies that facilitate noninfringing uses beyond the reach of ordinary citizens.<sup>110</sup> Rather than pushing to amend the current

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<sup>103</sup> *Judiciary Hearing, supra* note 65, at 43 (statement of Hon. Marybeth Peters).

<sup>104</sup> *Id.* at 44.

<sup>105</sup> *Judiciary Hearing, supra* note 65, at 48-49 (prepared statement of Hon. Marybeth Peters).

<sup>106</sup> *Id.* at 48.

<sup>107</sup> *Id.* at 49.

<sup>108</sup> *Id.* This last point is not necessarily true. To our knowledge, there are few if any laws against breaking into a room *per se*. If one has legally purchased the lock, the room, and the manuscript, breaking into the room would be perfectly legal—the objections of MasterLock notwithstanding. Yet if one buys a Region 1 DVD player and a Region 2 DVD that is unavailable in Region 1 format, it is illegal to tamper with the player in an effort to get it to access the contents of the DVD. On this count, at least, § 1201 gives copyright holders rights that supercede ownership rights in physical property.

<sup>109</sup> *Id.* at 49.

<sup>110</sup> *Id.*

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bill to avoid these possibilities, Peters seemed willing to accept the risk that market developments will obviate fair use because future legislatures can amend the bill later.<sup>111</sup>

Second, she argued that the bill would preserve fair use because “it contains a savings clause that explicitly preserves fair use and other exemptions to rights in the Copyright Act.”<sup>112</sup> While this clause<sup>113</sup> “may eliminate the possibility of an unclean hands-type argument in an infringement case,”<sup>114</sup> this would provide no defense against charges of illegal circumvention:

[T]he clause does not establish fair use as a defense to the violation of section 1201 in itself. . . . While the clause might be read by a court as a signal to extend the concept of fair use as a judge-made defense, it does not provide clear legislative authority to do so.<sup>115</sup>

To imply that the bill does no harm to fair use interests because of the savings clause, even though fair use is no defense for violating § 1201, was disingenuous at best. Further, Peters discussed a possible judicial construction to the contrary, in such a way as to reduce that possibility and alert the bill’s advocates to such unintended consequences. Peters’ congressional testimony provides additional support for Litman’s observation that the copyright office is very friendly to the copyright industries.

#### D. *Adding the Triennial Proceedings*

To some, the recurring procedure to determine exemptions may appear to be intended as an equitable solution to the harms to noninfringing uses created by TPMs. We strongly disagree. The appearance and evolution of the statutory provision for the hearings, as well as the reasoning behind each maneuver, help illustrate that most members of Congress were far more concerned with protecting the interests of copyright holders than with protecting fair use in the digital millennium.

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<sup>111</sup> *See id.* at 50.

<sup>112</sup> *Id.* at 49.

<sup>113</sup> 17 U.S.C. § 1201(c)(1) (2004) (“Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.”).

<sup>114</sup> *Judiciary Hearing, supra* note 65, at 50 (statement of Hon. Marybeth Peters) (As examples of “unclean hands” cases, Peters offers, “*Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 563 (1985) (weighing in the fair use balance the bad faith of the defendant in gaining unauthorized access to the plaintiff’s work) and *Atari Games Corp. v. Nintendo*, 975 F.2d 832, 843 (Fed. Cir. 1992).”).

<sup>115</sup> *Id.* at 48-49.

### 1. Commerce Version

As the bill worked its way through Congress, each committee left enough of a mark until the final array of statutory bans and exemptions was erratic, irrational, and confusing.<sup>116</sup> While the full tale of the bill's passage is worth telling, that is not our mission here. The most remarkable amendment to the original legislation—and the object of our study—is the appearance of a recurring rulemaking to determine exemptions to the basic ban. This first appears in the House Commerce Committee version of the bill:

(B) During the 2-year period described in subparagraph (A), and in each succeeding 2-year period, the Secretary of Commerce, in consultation with the Assistant Secretary of Commerce for Communications and Information, the Commissioner of Patents and Trademarks, and the Register of Copyrights, shall conduct a rulemaking on the record to determine whether users of copyrighted works have been, or are likely to be in the succeeding 2-year period, adversely affected by the implementation of [access-controlling TPMs] in their ability to make lawful uses . . . of copyrighted works. In conducting such rulemaking, the Secretary shall examine—

- (i) the availability for use of copyrighted works;
- (ii) the availability for use of works for archival, preservation, and educational purposes;
- (iii) the impact of the application of technological protection measures to copyrighted works on criticism, comment, news reporting, teaching, scholarship, or research;
- (iv) the effect of circumvention of technological protection measures on the market for or value of copyrighted works; and
- (v) such other factors as the Secretary, in consultation with the Assistant Secretary of Commerce for Communications and Information, the Commissioner of Patents and Trademarks, and the Register of Copyrights, considers appropriate.<sup>117</sup>

Based on this rulemaking, subparagraph (C) dictates that the Secretary determine the “particular class[es] of works” for which “lawful uses have been, or are likely to be, adversely affected,” and waives the basic ban's applicability to those classes “for the ensuing 2-year period.”<sup>118</sup>

This provision is noteworthy on several counts. First, it gives control of the proceedings to the Secretary of Commerce, who is

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<sup>116</sup> See Nimmer, *supra* note 6, at 675.

<sup>117</sup> H.R. REP. NO. 105-551, pt. 2, at 2-3 (1998).

<sup>118</sup> *Id.* at 3.

not particularly knowledgeable about copyright law. We take this to be a patent example of delegation as an aid to rent seeking. Second, the rulemaking asks the Secretary to balance the competing interests at stake—including especially access to noninfringing uses such as criticism and scholarship and the effect of circumvention on the market value of TPM-protected works. Third, the statute gives tremendous leeway to the Secretary in determining the rules and procedures for the hearing, even granting a license to consider whatever factors she deems appropriate in weighing proposed exemptions. This implies either a deep trust of the Secretary or a significant obstacle to collective action in the Committee.<sup>119</sup>

Fourth, despite the broad leeway in determining exemptions from the basic ban, it specifically precludes the Secretary from examining either trafficking ban. If the trafficking bans are effective and circumvention devices are unavailable, exemptions are effectively useless for those without the technical skill to circumvent TPMs.

Fifth, it more or less ties exemptions to specific classes of works rather than specific users or uses.<sup>120</sup> As Nimmer explains:

If users of physics textbooks or listeners to Baroque concerti, for example, find themselves constricted in the new Internet environment, then some relief will lie. If, on the other hand, the only problem shared by numerous disgruntled users is that each is having trouble accessing copyrighted works, albeit of different genres, no relief is warranted.<sup>121</sup>

This class-based relief fits poorly with several important, longstanding statutory exemptions to copyright that are based largely on the user or intended use.<sup>122</sup>

Finally, the proceedings grant an unusual power to an administrative agency. Exemptions to copyright law are generally adjudicated *post hoc* in federal courts. Agency rulings on copyright law have historically considered only technical matters,<sup>123</sup> and the

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<sup>119</sup> The final committee report does offer some further guidance on the rulemaking, discussed below. See *infra* Part III.D.2.

<sup>120</sup> While the statute is regrettably ambiguous on this point, we believe that it is most reasonably read as containing a clear and substantial shift from the use- or user-based statutory exemptions that are the norm in copyright law.

<sup>121</sup> Nimmer, *supra* note 6, at 695.

<sup>122</sup> *E.g.*, 17 U.S.C. § 107 (permitting the fair use of any copyrighted work “for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research”); 17 U.S.C. § 108 (granting librarians and archivists the right to make copies of any type of materials under certain circumstances); 17 U.S.C. § 110 (permitting the use of any copyrighted materials in teaching under certain circumstances).

<sup>123</sup> Nimmer, *supra* note 6, at 696-98.

Copyright Office, which reports to Congress, is historically granted jurisdiction. Despite vague resemblance to the four-factor fair use test,<sup>124</sup> the bill reclaims territory from longstanding judicial delegations, turns *post hoc* tradition around, and asks the Secretary to make exemptions prospectively. In light of judicial willingness to recognize exceptions to copyright such as fair use,<sup>125</sup> this venue shift is troubling for the defenders of noninfringing uses.

The move to an administrative hearing is another example of how “the anti-circumvention provisions . . . prevent courts from engaging in fair use analysis. Indeed, as technology becomes the primary means of protecting content, courts (and the constitutional limits on copyright) are removed entirely.”<sup>126</sup> For those who support increasingly strong copyright legislation, federal judges are untrustworthy agents, and the federal court system is an unsafe venue. Drawing on Epstein and O’Halloran,<sup>127</sup> these interests would likely describe federal judges as runaway agencies. In contrast, if Lehman’s congressional testimony is any indicator of the views of the Department of Commerce, this new, administrative venue will be very cozy for copyright holders and a serious threat to the ability of users to circumvent TPMs for noninfringing uses.

## 2. Commerce Committee’s Reasoning

In its final report,<sup>128</sup> the House Committee on Commerce offers a reasonably detailed rationale for its decision to insert a regular review of the basic ban. Due to digital media technology, especially the internet, the public has enjoyed dramatically increased access to a dizzying amount and variety of copyrighted materials:

Still, the Committee is concerned that marketplace realities may someday dictate a different outcome, resulting in less access, rather than more, to copyrighted materials that are important to education, scholarship, and other socially vital endeavors. This result could flow from a confluence of factors, including the elimination of print or other hard-copy versions, the permanent encryption of all electronic copies, and the adoption of business models that depend upon restricting distribution and availability, rather than upon maximizing it. . . . Given the threat

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<sup>124</sup> 17 U.S.C. § 107.

<sup>125</sup> *Id.*; *see, e.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).

<sup>126</sup> Jackson, *supra* note 2, at 639.

<sup>127</sup> EPSTEIN & O’HALLORAN, *supra* note 40.

<sup>128</sup> H.R. REP. NO. 105-551, pt. 2 (1998).



of a diminution of otherwise lawful access to works and information, the Committee on Commerce believes that a “fail-safe” mechanism is required.<sup>129</sup>

The above paragraph contains several noteworthy examples of flawed reasoning. First, the Committee acknowledged that the pre-DMCA status quo had produced an explosion of access to digitized materials. This hardly provided a compelling imperative to grant strong legal protections to TPMs. Second, the major marketplace development the Committee sought to avoid came not from uninhibited access to materials secured only by TPMs, but from monopolistic marketplace strategies enabled by the categorical ban on circumvention. The worst-case scenario results from the legislative “solution.” Third and finally, the Committee claimed to have devised a “fail-safe” measure, but the legislation deliberately eliminated the usual fail-safe: judicial oversight, including the capacity for *post hoc* corrections of would-be miscarriages of justice. In sum, the reasoning behind this new proceeding belies the poorly articulated justifications for the strong ban it leaves in place. The new law may do awful things, the Committee acknowledged, but they allowed a minor amendment at best.

The Committee report also provided more guidance regarding the rulemaking than did the proposed statutory text. The report detailed:

[T]he rulemaking proceeding should focus on distinct, verifiable and measurable impacts; should not be based upon de minimis impacts; and will solicit input to consider a broad range of evidence of past or likely adverse impacts. The criteria listed in subparagraph (B) are illustrative of the questions that the rulemaking proceeding should ask. In each case, the focus must remain on whether the implementation of technological protection measures (such as encryption or scrambling) has caused adverse impact on the ability of users to make lawful uses . . . . In conducting the rulemaking proceeding, the Secretary must consult closely with the National Telecommunications and Information Administration, as well as with the Patent and Trademark Office and the Register of Copyrights.<sup>130</sup>

While this clearly placed the burden of proof on those who propose exemptions, it did not represent that burden as particularly high:

If the rulemaking has produced insufficient evidence to

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<sup>129</sup> *Id.* at 36.

<sup>130</sup> *Id.* at 37.

determine whether there have been adverse impacts with respect to particular classes of copyrighted materials, the circumvention prohibition should go into effect with respect to those classes. Only in categories as to which the Secretary finds that adverse impacts have occurred, or that such impacts are likely to occur within the next two years, should he or she waive the applicability of the regulations for the next two years.<sup>131</sup>

This language focused on the positive existence of such a burden of proof. Yet it implied that sufficient evidence to demonstrate adverse impacts would lead to an exemption. The statute counterbalanced this with factors such as “the effect of circumvention of technological protection measures on the market for or value of copyrighted works,”<sup>132</sup> but nowhere did the Committee or the statute imply that the burden for proving adverse effect was particularly high or difficult to meet.

Even so, not every member of the Committee found this amendment adequate. In an addendum to the report,<sup>133</sup> Representatives Scott Klug and Rick Boucher commended the value of the amendments but expressed sincere reservations about the bill that remained. They attempted to re-reframe the debate, drawing on constitutional and judicial language that demanded a limited copyright targeted more toward social benefit than private rent seeking.<sup>134</sup> Yet their tale of attempting to implement a fair use defense, a potential legal shield for those charged with violating the basic ban, was one of heart-wrenching defeat:

For reasons not clear to us, and despite the WIPO Treaty language “recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information \* \* \*” our proposal was met with strenuous objection. It continued to be criticized even after it had been redrafted, and extensively tailored, in response to the myriad of piracy concerns that were raised.<sup>135</sup>

The rulemaking proceeding, a “compromise amendment” by Klug, offered no such “applicability of traditional copyright limitations and defenses” to charges of circumvention.<sup>136</sup> Unable to secure such an amendment, a hope embodied in H.R. 3048, Klug and

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<sup>131</sup> *Id.* at 38.

<sup>132</sup> *Id.* at 2.

<sup>133</sup> *Id.* at 85.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 86.

<sup>136</sup> *Id.*

Boucher settled for “[d]elegating authority to develop anti-circumvention regulations to the Secretary of Commerce [as] a means to eliminate the stalemate that existed.”<sup>137</sup> The idea for delegating rulemaking authority to the Secretary fit what Hazlett and Spitzer identified as the theory of “[d]elegation as part of solving the collective action problem in Congress.”<sup>138</sup> Delegating this power to the Secretary was palatable to the larger committee because it still effectuated a decrease in the power of the courts—shifting venues from a fairly hostile locale to a fairly friendly one.

Yet the bill’s House supporters likely had the votes necessary to pass the bill without the Klug amendment; this implies that they saw something in the amendment worth allowing. Boucher’s vocal opposition to the bill certainly gave them pause, and the amendment gave them an out. We believe that one explanation is the most plausible: this delegation of authority is perfect to effectuate credit claiming and blame shirking. So long as the rulemaking is only a minor threat to the interests of the copyright industries, those industries’ lobbyists will be grateful to have shifted questions of fair use away from the federal courts and will (quietly) thank Congress for the venue shift. Yet the Commerce Report already began the process of blame shirking: the Register of Copyrights and the Librarian of Congress were entrusted with protecting the right to make noninfringing uses, so Congress had a scapegoat when critics came knocking.<sup>139</sup>

### 3. Conference Version

Thanks to the joint House-Senate conference committee, the final legislation implemented the amendments of both chambers, with minor changes, and added a few of its own. Taking its cue from one or both chambers, the conference report included exemptions from one, two, or all three bans for nonprofit libraries,<sup>140</sup> reverse engineering,<sup>141</sup> encryption research,<sup>142</sup> and protecting personally identifying research.<sup>143</sup> It added an exemption from the access trafficking ban for devices with the sole purpose of preventing “the access of minors to material on the

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<sup>137</sup> *Id.*

<sup>138</sup> Hazlett & Spitzer, *supra* note 37, at 136.

<sup>139</sup> While we support the work done by Hartzog, *supra* note 19, his article falls into this trap. By criticizing the rulemaking absent a theory of delegation, Hartzog fails to lay adequate blame at the feet of Congress.

<sup>140</sup> H.R. REP. NO. 105-796, at 7 (1998) (§ 1201(d)).

<sup>141</sup> *Id.* at 8 (§ 1201(f)).

<sup>142</sup> *Id.* at 8-10 (§ 1201(g)).

<sup>143</sup> *Id.* at 10-11 (§ 1201(i)).

Internet.”<sup>144</sup> The conference version exempted one from the basic ban and the access trafficking ban in order to engage in security testing of one’s own computer.<sup>145</sup> The last new section mandated that VCRs and similar devices recognize and obey the copy-preventing technologies for which TPM-vendor Macrovision held the patents; the conferees did so on Macrovision’s promise to charge “reasonable and non-discriminatory” licensing fees.<sup>146</sup>

The only amendment that the conference version substantively changed was the Klug amendment legislating a regular rulemaking proceeding. Rather than entrusting the Secretary of Commerce, the conferees delegated this new power to the Librarian of Congress, who shall issue any exemptions “upon the recommendations of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce.”<sup>147</sup> The conference version also changed the rulemaking’s frequency from biennial to triennial. Otherwise, the conference version implemented the rulemaking in virtually the same language. The rulemaking was to consider the same five factors. Likewise, the statute still militated against judicial *post hoc* pardons by defining the triennial proceedings as the only legitimate route to exemptions.<sup>148</sup>

The final conference report devoted very little space—less than one full sentence—to explaining its change in delegation from the Secretary of Commerce to the Register of Copyrights. The conferees gave this power to the Register, “as is typical with other rulemaking under title 17, and in recognition of the expertise of the Copyright Office.”<sup>149</sup> The official reasons for choosing this particular agent were precedent and expertise—both valid reasons for choosing the Register over the Secretary of Commerce.

While delegation to a seasoned expert is a legitimate claim, theories further down on Hazlett and Spitzer’s list provide a more exhaustive explanation for the motivation behind this second shift of venue. If the Commerce delegation was a barely clothed move of rent extraction, then the Judiciary committees, which both have supervisory authority over the Register and (unlike Commerce) are

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<sup>144</sup> *Id.* at 10 (§ 1201(h)).

<sup>145</sup> *Id.* at 11 (§ 1201(j)).

<sup>146</sup> *Id.* at 11-14 (§ 1201(k)). This amendment, a rider added during conference committee markup, is obviously a financial windfall for Macrovision with significant implications for users and developers of VCRs.

<sup>147</sup> *Id.* at 5 (§ 1201(a)(1)(C)).

<sup>148</sup> Nimmer, *supra* note 6, at 698, n.129.

<sup>149</sup> H.R. REP. NO. 105-796, at 64 (1998).

both at the table in the conference negotiations, may be characterized as a rent-grabbing move.<sup>150</sup> Further, the Register had become increasingly friendly to copyright interests in the years leading up to the legislation for structural reasons<sup>151</sup> that will likely persist indefinitely. Since the DMCA is constructed to benefit copyright holders rather than the public,<sup>152</sup> the actors driving the bill forward were likely more comfortable with a venue shift that placed these questions before the Register, because institutional pressures force her to be a particularly loyal and predictable agent. The final recommendations in 2000 and 2003 largely fulfilled this promise.<sup>153</sup> Finally, choosing an expert overseer better facilitates blame shirking. A delegation to the Secretary of Commerce, who is no expert, simply looks less like an honest deference to a capable agent; the Register of Copyrights, however, is an undeniable expert. Few citizens are adequately invested in copyright policy to criticize the final rulings, and even fewer are likely to follow the legislative trail closely enough to impugn specific congresspersons' motivations. Under cover of deferral to expertise, congressional actors can delegate to the Register, remove courts from the equation, launder their motivations, and quietly cash in political capital with the copyright industries.

Since the rulemaking was essentially the same and the substantive total of statutory exemptions was barely enlarged, the concerns expressed by Klug and Boucher regarding the Commerce version were still applicable to the final version. Mysteriously, both Boucher<sup>154</sup> and Klug<sup>155</sup> changed their tune, publicly rising to support the final bill. "Whether as a matter of conviction or acknowledgment of political reality, at the end of the day no one remained opposed to the entire Digital Millennium Copyright Act."<sup>156</sup> We suspect that their reservations about § 1201 were

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<sup>150</sup> LITMAN, *supra* note 17, at 144 (arguing that the assignment of rulemaking responsibility to the "Librarian of Congress in consultation with the Copyright Office and the Commerce Department" would preserve both "Commerce and Judiciary Committee jurisdiction and the associated generous campaign contributions.").

<sup>151</sup> *Id.* at 74. Litman elaborates:

The Copyright Office has a limited budget, and relies on the goodwill of its regular clients. Copyright Office policy staff often come from and return to law firms that regularly represent copyright owners. Perhaps most importantly, the Copyright Office relies on the copyright bar to protect it from budget cuts and incursions on its turf.

*Id.*

<sup>152</sup> *Id.* at 144-45 ("There is no overarching vision of the public interest animating the Digital Millennium Copyright Act. None.").

<sup>153</sup> See *infra* Part IV.C.

<sup>154</sup> 144 CONG. REC. H7096 (daily ed. Aug. 4, 1998) (statement of Rep. Boucher).

<sup>155</sup> 144 CONG. REC. H10621 (daily ed. Oct. 12, 1998) (statement of Rep. Klug).

<sup>156</sup> Nimmer, *supra* note 6, at 725.

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muted by their enthusiasm for the provisions granting new immunities to telecommunications companies in their new role as internet service providers.<sup>157</sup>

#### IV. ANALYSIS OF STAKEHOLDER FRAMES

Our preliminary analysis of the primary frames used by the categories of stakeholders we have identified is directed toward answering three research questions:

- 1) What are the primary rhetorical distinctions between those who support and those who oppose the granting of exceptions to the § 1201 rules?
- 2) How do participants frame the legislative intent behind the assignment of rulemaking authority to the Register of Copyrights and the Librarian of Congress?
- 3) How does the Register use the legislative history and participants' arguments in granting or denying exemptions?

The raw materials for our analysis come from the publicly available records of the 2000<sup>158</sup> and 2003<sup>159</sup> hearings, from Notice of Inquiry through final ruling. The Copyright Office has posted every document from both proceedings on its website,<sup>160</sup> greatly facilitating our study. The 2000 hearings featured 235 written comments, 129 reply comments, 31 individual testimonials, and 28 written post-hearing replies.<sup>161</sup> The 2003 hearings featured 51 comments, 338 reply comments, 63 individual testimonials, and 25 written replies to 9 post-hearing questions.<sup>162</sup> Once one adds in 5 Notices of Inquiry in the Federal Register, 22 question-and-answer sessions, twice-daily opening statements for live hearings by the Register of Copyrights, and final recommendations by the Register and/or final rulings from the Librarian of Congress, the website

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<sup>157</sup> During the 1996 election cycle, while copyright holders were substantive contributors to both representatives' campaigns, in both cases—especially for Boucher—telecommunications firms outspent the copyright holders. See Rick Boucher, *Detailed Contributor Breakdown, 1996 Election Cycle*, <http://opensecrets.org/1996os/detail/H2VA09010.htm> (last visited Oct. 27, 2005); Scott L. Klug, *Contributions by Sector, 1996 Election Cycle*, <http://opensecrets.org/1996os/detail/H0WI02037.htm> (last visited Oct. 27, 2005).

<sup>158</sup> U.S. Copyright Office, Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works (2000), <http://www.copyright.gov/1201/anticirc.html> [hereinafter 2000 Rulemaking].

<sup>159</sup> U.S. Copyright Office, Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works (2003), <http://www.copyright.gov/1201/2003/index.html> [hereinafter 2003 Rulemaking].

<sup>160</sup> The Office has made citation somewhat difficult by periodically changing URLs; we expect this problem to grow during the 2006 rulemaking.

<sup>161</sup> 2000 Rulemaking, *supra* note 158.

<sup>162</sup> 2003 Rulemaking, *supra* note 159.

offers over 900 documents for analysis. To reduce this to a somewhat more manageable load, we excluded the 465 written submissions that were not over one page long—a length we believe is necessary to begin developing a cohesive or unique argument.<sup>163</sup> We loaded the 466 remaining documents into QSR N6, a content analysis software program. N6 allows users to conduct string searches across all documents and to individually code text units by hand.

We divide our analysis of these proceedings into three sections. First, we discuss the breakdown of documents according to witness affiliation, which is associated with participation in live testimony and with support for exemptions. Second, we discuss the different rhetorical choices by those who support and those who oppose exemptions. Third, we examine the final recommendations and rulings in detail.

#### A. *Coding by Witness Affiliation*

To begin our analysis, we hand coded all 466 documents according to the author's self-avowed institutional affiliation. For example, if a witness stated, "I am here representing Time-Warner," we coded her as belonging to "media." Note that those whom we coded as representing merely themselves are of two types: those who explicitly denounced any official affiliation (e.g., stating that they do not speak for their employer) and those who announced no affiliation. Table One shows how commenters and witnesses were divided across eight categories.

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<sup>163</sup> After coding the longer documents, we returned to a random sample of fifty of the 465 comments that were excluded for being one page or less in length. Of these fifty documents—all of which oppose 1201 generally and/or support one or more exemptions with varying clarity—only three discuss legislative intent, and only eleven even mention fair use. The most common theme, featured in a majority of the documents (27), is an author's complaint about various consumer experiences with TPM-protected media. Almost all of these (25) and about half of the other documents (11) object to the DVD Content Scrambling System (CSS). That is thirty-six out of fifty, or 72% of the total.

TABLE 1: NUMBER OF DOCUMENTS BY WITNESS TYPE

Witness Type	Examples/Description	No. Docs	% of Total
Self	Those who disavow or do not present any official affiliation	172	37%
Technology Firms	Consumer electronics, computer hardware, business software, e-security products, web filtering software, copy-control technology	88 <sup>164</sup>	19%
Media Firms	Publishing, recorded music, TV, radio, webcasters, media industry associations (e.g., RIAA)	62	13%
Nonprofit Advocacy	Groups that advocate on behalf of certain sectors of the population (e.g., Amer. Foundation for the Blind) or the general public (e.g., Electronic Frontier Foundation)	34	7%
Government	Those who are steering the proceedings (e.g., Register of Copyrights), other officials (e.g., Idaho State Controller's Office)	29	6%
Library	Library associations, official representatives of individual libraries, the Internet Archive	28	6%
Education	Colleges & universities only	25	5%
Question & Answer	Involved multiple witnesses during live hearings	22	5%
Joint Reply Commenter (JRC)	Attorney hired by multiple firms to oppose exemptions	11	2%
TOTAL	Number of Documents Searched	466	100%

This table makes clear that a number of different stakeholders were well-represented, including: media companies, technology firms, educators, and librarians. The general public was well-represented; people with no official affiliation participated heavily. This is not true, however, across all types of participation. The bulk of unaffiliated individuals did not participate in live hearings, as evidenced in Table Two.

<sup>164</sup> We coded the testimony of Peter Jaszi, speaking on behalf of the Digital Future Coalition (DFC), as both “technology” and “nonprofit.” The DFC is itself a nonprofit advocacy group that has attracted educators, librarians, and activists to its cause (therefore resembling, in tenor, goals, and structure, groups such as Public Knowledge), but it is also associated with consumer electronics manufacturers. Four additional documents are coded as both Technology and Media. This caused the misalignment between the total among categories (446) and the total number of documents (441), in this and other tables involving witness categories.



TABLE 2: TYPE OF PARTICIPATION BY WITNESS TYPE

Witness Type	Comment	Reply Comment	Oral Testimony	Post-Hearing Comment <sup>165</sup>	Rules <sup>166</sup>	Rulings <sup>167</sup>
Self	97	62	7	6	–	–
Tech	18	38	21	11	–	–
Media	5	20	21	16	–	–
Nonprofit	8	7	14	5	–	–
Gov't	1	2	–	–	23	3
Library	2	9	12	5	–	–
Education	9	5	8	3	–	–
Joint Reply Commenter	–	–	6	5	–	–

Literally anybody can submit a written comment or reply comment, and that is reflected in the fact that a majority of these documents were by authors claiming no institutional affiliation. Note, however, the large disparity in which witness types presented live testimony; we believe this speaks volumes about the level of access actually enjoyed by different types of witnesses. The hearings are formally open to any and all comers,<sup>168</sup> but the time and expense of traveling to the hearings represents a substantial burden for most people. To demonstrate the increased access available to various witness types, we take the number of live testimonials and divide by the total of comments, reply comments, and testimonials. By this formula, 52% of documents representing the views of librarians (12 of 23 total) were delivered in person, and nonprofit advocacy groups (48%) and the media industry (46%) enjoyed comparable favorable ratios. Education (36%) and technology (27%) enjoyed somewhat lower rates, though in the case of technology submissions, this was due largely to a relative glut of written submissions (56), not to a paucity of live testimonials (21). What is most striking is the very low rate of live testimonials for unaffiliated individuals (a mere 4%) and the 100% live testimonial ranking for the Joint Reply Commenter, Attorney Steve Metalitz.<sup>169</sup>

<sup>165</sup> The general public was allowed to offer post-hearing comments in 2000 only. In contrast, post-hearing comments in 2003 represent answers to nine written questions that were posed only to those who gave oral testimony.

<sup>166</sup> “Rules” documents set ground rules for the hearings, including Notices of Inquiry in the Federal Register, daily opening statements by the Register of Copyrights, and questions soliciting post-hearing comments.

<sup>167</sup> 2000 Ruling, *supra* note 198, 2003 Ruling, *supra* note 199, and 2003 Recommendations, *supra* note 200.

<sup>168</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Extension of Deadline for Reply Comment Period; Notice of Public Hearings; and Deadline for Post-Hearing Comments, 65 Fed. Reg. 14505 (Mar. 17, 2000), available at <http://www.copyright.gov/fedreg/2000/65fr14505.html>.

<sup>169</sup> Metalitz twice offered written reply comments on behalf of media companies. *See*

For the sake of this preliminary analysis, we restricted our investigation to those documents discussing legislative intent. Recall that the text of the legislation left the rules of the proceedings very much up in the air, giving great discretion to the Register of Copyrights; this placed questions of legislative intent at the very heart of the debate about what these rules should have been. To locate these arguments, we searched for the following terms, including all derivatives: Legislat (including, e.g., legislative, legislature, legislate, legislated, etc.), Congress (congressional), Histor (history, historical, historically, etc.), Inten (intend, intended, intention, intentionally, etc.), and Mean (meaning, meant). Then we searched for combinations of either “legislat” or “congress” within two lines of any of the other three terms and hand-coded for false hits.

This “legislative intent” search retrieved 130 documents (28%), of which twenty were question and answer sessions, which we have not included for this preliminary study.<sup>170</sup> Of the remaining 110 documents, witnesses were again far more likely to report an institutional affiliation, and institutional affiliation was a reasonable predictor of whether a given witness supported or opposed exemptions to the basic ban, as illustrated in Table Three. Note that the order in which witness types are listed, ranked by total number of “legislative intent” documents, differs from that in Tables One and Two. This reflects the fact that unaffiliated witnesses were disproportionately unlikely to make claims about legislative intent.

As one would expect, media companies were generally opposed to exemptions (that is, in favor of a total ban on circumvention) while education, library, and nonprofit groups were uniformly in support of exemptions. Technology, which includes hardware manufacturers, software developers, scientific bodies (e.g., the Association for Computing Machinery), stakeholders that stand to profit from TPMs (e.g., Macrovision, Inc.), and those who

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Steven J. Metalitz, 2000 Reply Comment (Mar. 31, 2000), <http://www.copyright.gov/1201/comments/reply/112metalitz.pdf> [hereinafter Metalitz, 2000 Reply Comment], and Steven J. Metalitz & Eric J. Schwartz, 2003 Reply Comment (Feb. 20, 2003), <http://www.copyright.gov/1201/2003/reply/023.pdf> [hereinafter Metalitz & Schwartz, 2003 Reply Comment]. His participation as a Joint Reply Commenter, representing multiple copyright holders, is simply a cost-saving measure.

<sup>170</sup> Much of our analysis is based on the coding of entire documents, e.g. coding by witness type, and/or whether certain codes are found within a given document. (Due to software limitations, this emphasis greatly simplifies our analysis.) The question-and-answer documents, however, feature large amounts of text from multiple questioners and witnesses. For simplicity's sake we therefore elide these more difficult-to-handle documents from consideration.

TABLE 3: “LEGISLATIVE INTENT” DOCUMENTS BY WITNESS TYPE

Witness Type	Total	Number Retrieved	% Total By Witness Type	Of Documents Retrieved, Number Supporting/Opposing Exemption			
				Support	Oppose	Mixed	Neutral
Tech	88	32	36%	14	18	–	–
Media	62	27	44%	4	23	–	–
Nonprofit	34	16	47%	16	–	–	–
Education	25	11	44%	11	–	–	–
Library	28	8	29%	8	–	–	–
Gov’t	29	8	28%	–	–	3	5
Self	172	8	5%	8	–	–	–
Joint Reply Commenter	11	4	36%	–	3	–	1
	444	110	23%	60	41	3	6

can profit from circumventing TPMs (e.g., Static Control Components), is understandably divided. It is unsurprising that these allegiances carried over from the congressional debate.

#### B. *Claims of “Legislative Intent” by Proponents and Opponents*

Based on the string search for legislative intent claims, we hand-coded each of the 110 documents to determine the overall context of these claims. We examined the broader argument within which each claim was found and coded the document accordingly. Based on this analysis, we found over sixty unique argumentative tropes. We also coded these documents based on whether they were in support of an exemption to the general ban on TPM circumvention, in opposition to one or more exemptions, or were mixed (e.g., supporting some exemptions and opposing others) or neutral (taking no position). Table Four summarizes the most common pro-exemption arguments (those that appeared in at least four documents) and Table Five summarizes the most common anti-exemption arguments.

TABLE 4: FREQUENCY OF PRO-EXEMPTION ARGUMENTS

Argument	No. Pro- Exemp (T=60)	No. Anti- Exemp (T=41)	No. Mixed 171 (T=3)	No. Neutral (T=6)	Total (T=110)
* § 1201 intends to preserve fair use	50	–	3	–	53
* Without an exception, § 1201 will shrink fair use	45	–	3	2	50
* Intent of other copyright law is to preserve fair use	16	–	1	0	17
* Ban on circumventing access controls will envelop circumvention of use controls	12	–	1	–	13
+ Urges a use-based exemption	11	–	–	–	11
+ Exemptions can legitimately be based on class of users	10	–	–	1	11
* Effects of § 1201 will be to eliminate first-sale doctrine	10	–	–	–	10
The statute is unclear	7	–	2	1	10
‡ The pro-exemption side meets its burden of proof	6	–	3	–	9
* (Attacking an interpretation as shrinking fair use)	8	–	–	–	8
* Intent was not to eliminate first-sale	8	–	–	–	8
‡ Burden of proof should be possible/reasonable	7	–	–	1	8
* Exemption is not a threat to content production	6	–	1	–	7
+ Proposed class of works is defined properly	3	–	3	–	6

\* = Public policy goals/outcomes  
‡ = Jurisdictional/procedural  
+ = Class of works

<sup>171</sup> Just three documents had arguments for some exemptions and against others: the three rulings documents. *Id.* All three supported some exemptions and opposed others.

TABLE 5: FREQUENCY OF ANTI-EXEMPTION ARGUMENTS

Argument	No. Pro- Exemp (T=60)	No. Anti- Exemp (T=41)	No. Mixed 172 (T=3)	No. Neutral (T=6)	Total (T=110)
‡ Pro-exemption arguments fail burden of proof	–	33	3	1	37
‡ Burden of proof is on those who propose exemptions	–	24	3	5	32
‡ Burden of proof is high/ difficult to meet	–	23	2	4	29
* Proposed exemption threatens content production	–	20	3	–	23
‡ Cited pro-exemption arguments are irrelevant in this venue	–	18	3	–	21
+ A proposed class of works is too broad	–	16	3	2	21
‡ Must weigh decline in creative output against harms to noninfringing users	2	13	3	3	21
+ A proposed class is wrongly based on traits of users, not of the works themselves	–	9	3	–	12
* Alternative (e.g., analog) formats remove the need for an exemption	–	5	3	2	10
* Fair use concerns are not relevant	–	8	1	–	9
* § 1201 will not cause alleged negative effects on fair use	–	6	2	–	8
* Intent of § 1201 is to increase TPM use	–	4	1	–	5
+ A proposed class of works cannot be defined by TPMs	–	2	3	–	5
‡ First sale concerns are not relevant	–	3	1	–	4
Librarian of Congress/ Register of Copyrights interpret statute correctly	–	2	2	–	4

\* = Public policy goals/outcomes  
‡ = Jurisdictional/procedural  
+ = Class of works

The cleavage between the two sides could hardly be clearer. Only two documents that either supported or opposed exemptions featured a trope from the other side, and these documents featured just one such trope. The only three “mixed” documents, supporting some exemptions and opposing others, were the three final rulings documents by the Register and/or the Librarian, and five of the six “neutral” documents were documents laying the ground rules such as Notices of Inquiry. In such an oppositional

<sup>172</sup> Just three documents had arguments for some exemptions and against others: the three rulings documents. *Id.* All three supported some exemptions and opposed others.

forum, we expected a sincere cleavage, but the extent of the gap was surprising. Almost all of the arguments offered by both sides fit neatly into three categories: arguments about the public policy goals and outcomes of the statute (e.g., preserve fair use, protect copyright holders), arguments about the proper procedure and jurisdiction of the rulemaking, and arguments about what constitutes a “class of copyrighted works” as defined in § 1201(a)(1)(D).

### 1. Public Policy Goals and Outcomes

The only legislative intent arguments made by even a sizable number of those who support exemptions were those from the cluster of arguments centering on claims of fair use.<sup>173</sup> Of the 60 supporting documents, 50 claimed that § 1201 intends to preserve fair use—especially through the establishment of the triennial hearings. Appearing in sixteen documents, the third most common claim was that the intent of other sections of copyright law or of copyright law as a whole is to preserve fair use. Contrasting this intent with likely effect, forty-five documents featured the claim that, without an exemption, § 1201 would reduce or eliminate the ability of some or all people to make fair uses. These claims resembled those of a defendant in an infringement suit—so long as a fair use was endangered, they collectively implied, a given circumvention must be found “not guilty” in advance and an exemption granted.

Proponents’ fair use claims also often resembled those of Congressional witnesses urging the repeal or rewrite of § 1201. Consider this line from the 2003 comment on behalf of the Internet Archive. “The proposed exemption restores the proper balance by enabling lawful preservation of what an archive has lawfully obtained.”<sup>174</sup> The allusion to the balance between protection for authors and protection of the public’s broader interest was just one example of the broad-minded policymaking rhetoric with which many pro-exemption witnesses framed their discussion of fair use. A similar, albeit less common trope featured the claim that the law’s intent was not to eliminate the first sale

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<sup>173</sup> In an effort to remain true to the argumentation of witnesses, these categories include a large number of claims that are not necessarily tied to fair use in the sense laid out in 17 U.S.C. § 107. Witnesses often tied pro-exemption arguments to claims of fair use but infrequently made explicit reference to the statute, its contents, or the corresponding case law. “Fair use” is often used in a broader, almost colloquial sense of (sometimes merely allegedly) non-infringing uses generally; our coding matches this fact.

<sup>174</sup> Brewster Kahle, Alexander Macgillivray, Lawrence Lessig, & Wendy Seltzer, 2003 Comment, 6-7 (Dec. 18, 2002), <http://www.copyright.gov/1201/2003/comments/025.pdf> [hereinafter Kahle *et al.*, 2003 Comment].

doctrine, but the effect would be just that without one or more exemptions. These arguments closely resembled the congressional statements that we must reject a pay-per-use society.<sup>175</sup>

While it was made in just twelve of sixty documents, the fourth most common claim by proponents was that the ban on circumventing access controls was effectively becoming a ban on circumventing use controls. These proponents objected to dual-purpose TPMs being entirely subject to § 1201(a)(1) protections. The DVD Content Scrambling System (CSS) was particularly likely to be the subject of this claim. Electronic Frontier Foundation witness Robin D. Gross offered just one such example:

CSS is not the type of “access” control technology that Congress intended to protect when it enacted the DMCA . . . . DVDs using CSS do not protect against unauthorized access to a work. Pirated DVDs have no trouble playing in DVD-CCA’s licensed players. Rather, the system’s design and ultimate objective is to prevent unauthorized copying—by requiring consumers to use devices which obey design restrictions that prevent such copying.<sup>176</sup>

Gross and others claimed that Congress had intended to provide greater protections for access-controlling TPMs, but copyright holders were using technical and legal strategies to “circumvent Congress”<sup>177</sup> and to provide fuller protection for use-controlling TPMs. This constructed the proceedings as a mechanism for clearing up unintended consequences of the law and for better effectuating the statute’s policy goals.

A far smaller proportion of exemption opponents’ rhetoric consisted of arguments about the public policy goals and outcomes of the statute. Most surprisingly, just twenty of the forty-one documents contained the argument that a proposed exemption threatened content production because copyright holders would not distribute content digitally without the fullest legal protection. They made this claim infrequently even though this was a vital part of the statute’s original policy justifications.<sup>178</sup> As we discuss below, opponents found other, more efficient means of rebutting proposed exemptions.

Opponents’ second, third, and fourth most common public

<sup>175</sup> See, e.g., Nimmer, *supra* note 6, at 710-19 (citing congressional avowals that the bill shall not lead to a pay-per-use society).

<sup>176</sup> Robin D. Gross, 2000 Post-Hearing Comment, 1 (June 23, 2000), <http://www.copyright.gov/1201/post-hearing/gross.pdf>.

<sup>177</sup> *Id.* at 3.

<sup>178</sup> See *supra* Part III.C.

policy arguments were targeted at rebutting proponents' fair use claims. In eight documents, opponents insisted that fair use claims were not relevant for one reason or another—especially based on the claim that an intended use is not actually a fair use at all. Consider Steven Marks' 2003 testimony on behalf of the RIAA:

The proponent's exemption is also misguided in that it is predicated on the assumption that users, or consumers, have an unqualified right to access works on any device of their choosing . . . . There is nothing in the DMCA or the fair use doctrine that's intended to ensure access to every work in every format.<sup>179</sup>

In addition to this argument that a given proposal fails to capture the policy intent of the DMCA and the fair use defense, six opponents argued that a supposed negative effect on fair use would not occur. In 2000, MPAA witness Bernard Sorkin opened his testimony by accusing proponents of wildly exaggerating their claims of fair use erosion. "I appreciate the opportunity of being here to testify before you in the hope of convincing you that we are not on the brink of the end of Western civilization as we know it."<sup>180</sup> Further, in five documents, opponents contended that the availability of media in unencrypted formats—e.g., VHS cassettes instead of DVDs—obviated the need for an exemption; would-be fair users could use these unencrypted alternatives. Except to dismiss the claim that an exemption would reduce creative output, opponents generally avoided the broader public policy debate, and those who engaged the debate did so only to rebut fair use claims made by proponents.

## 2. Procedural and Jurisdictional Claims

Instead of public policy claims, opponents devoted most of their energies to making claims about the proper procedure and jurisdiction of the proceedings; where proponents fretted about outcomes, opponents stressed strict adherence to the rules of the venue. Each of the most common opposition arguments was a claim about burden of proof. Consider the argument that

<sup>179</sup> *Rulemaking Hearing: Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works*, 209-10 (May 14, 2003) (statement of Steven Marks, Senior Vice President, Business and Legal Affairs, Recording Industry Association of America), <http://www.copyright.gov/1201/2003/hearings/transcript-may14.pdf>.

<sup>180</sup> *Hearing on Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 122 (May 4, 2000) (statement of Bernard Sorkin, Time Warner, Motion Picture Association of America.), <http://www.copyright.gov/1201/hearings/1201-504rev.pdf>.



proponents needed to meet the burden of proof. As we discuss more fully below, this argument was hardly necessary, as the Register made it quite clear from the beginning. Nonetheless, in twenty-four out of forty-one documents, opponents made exactly that claim. In all but one of those documents, opponents framed the burden as particularly high or difficult to meet. Language like that used by Adobe witness Paul Hughes, “[t]hose who assert that the effective date of the § 1201(a)(1)(A) prohibition should be further delayed shoulder an extraordinarily high burden of persuasion,”<sup>181</sup> was fairly common. Ironically, Hughes may not have created this sentence whole cloth for his live testimony; months earlier, Metalitz had submitted a written comment containing the same sentence, except he used the word “heavy” instead of “high”.<sup>182</sup>

Opponents’ use of the imagery of the weary proponent with a mammoth weight on her shoulders was common. With minor variation, opponents painted the hearings as a last-ditch failsafe mechanism primarily to guard against businesses using TPMs in a way that, on balance, obviously and seriously damaged the public interests. Consider the 2003 reply comment of AOL Time Warner Vice President Shira Perlmutter, in which she stated, “[t]he legislative history anticipates the granting of exemptions in exceptional circumstances as a *failsafe mechanism* to guard against a *diminution* in the availability of a particular class of copyrighted works.”<sup>183</sup> Metalitz used similar language, chiding proponents for failing to paint a similar picture of the proceedings. “They do not recognize that any demonstrable adverse impact must be balanced against the role of the prohibition in fostering the proliferation of “use facilitating” access control measures, that enable licensing and other noninfringing uses of copyrighted materials in the digital networked environment.”<sup>184</sup> Repeatedly, opponents amassed a wealth of burdensome standards for exemption proponents.

Even more frequent was the claim that exemption proponents failed to meet this burden; fully 80% (33) of opponents made this claim. This claim was often made in response to specific proposals, but it was also made quite often in the totalizing, dismissive fashion

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<sup>181</sup> *Hearing on Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, (statement of Paul Hughes) (May 19, 2000), <http://www.copyright.gov/1201/hearings/1201-519.pdf>.

<sup>182</sup> Metalitz, 2000 Reply Comment, *supra* note 169, at 3. We suspect that, even were his submission subject to copyright, Metalitz would overlook this minor infraction.

<sup>183</sup> Shira Perlmutter, 2003 Reply Comment, at 8 (Feb. 20, 2003), <http://www.copyright.gov/1201/2003/reply/019.pdf> (citing H.R. REP. NO. 105-551, pt. 2, at 36).

<sup>184</sup> Metalitz, 2000 Reply Comment, *supra* note 169, at 4.

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of Software & Information Industry Association witness Keith Kupferschmid. “In sum, we concluded that none of the 10 initial or reply comments submitted, either individually or taken as a whole, provide sufficient concrete evidence to justify the creation of an exemption to Section 1201(a)(1).”<sup>185</sup> Additionally, this argument was often combined with claims about a high burden of proof. Steven Marks’ words are again instructive; he saw “the failure of proof by the proponents and the lack of a widely-felt, open and notorious problem that might justify an exemption.”<sup>186</sup> This one-two punch, composed of setting high standards and blaming proponents for not meeting them, was the bread-and-butter of exemption opponents.

Opponents also used jurisdictional claims to respond to the broader policy claims by proponents. A fair number (17) dismissed specific pro-exemption arguments as being beyond the jurisdictional pale of the proceedings. Consider the remarks of Association of American Publishers Vice President Allen Adler:

While it is clear that “fair use” is among the non-infringing uses that are subject to this proceeding’s mandate . . . , it is also clear that this proceeding’s mandate does not invite the Librarian to engage in the frolic of attempting to define what uses constitute “fair use” with respect to ebooks.<sup>187</sup>

Opponents did not stop at insisting that the proceedings were not a courtroom; they also insisted that the Register of Copyrights and the Librarian of Congress could not make decisions that resembled or undermined Congress’s legislative powers. BSA President Robert W. Holleyman, II argued:

Many of the comments suggest . . . that the rulemaking should change the law itself, and provide for a general exception permitting reverse engineering. We respectfully submit to you that making such a change to the law is outside the scope of this rulemaking as directed by the Congress.<sup>188</sup>

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<sup>185</sup> *Hearing on Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies* at 136 (May 2, 2000) (statement of Keith Kupferschmid, Software and Information Industry Ass’n), <http://www.copyright.gov/1201/hearings/1201-502rev.pdf>.

<sup>186</sup> Steven Marks, Post-Hearing Response to Question 6, at 3 (July 28, 2003), <http://www.copyright.gov/1201/2003/post-hearing/post22.pdf>. While we may have missed it, we believe the word “notorious” is not in the legislative history; we are a good deal more confident that the standard of notoriety is also not there.

<sup>187</sup> Allen Adler, 2003 Reply Comment, 5 (Feb. 20, 2003), <http://www.copyright.gov/1201/2003/reply/026.pdf>.

<sup>188</sup> Robert W. Holleyman II, 2000 Reply Comment, 2 (March 31, 2000), <http://www.copyright.gov/1201/comments/reply/118bsa.pdf>.

When proponents appeared to be unhappy with the rulemaking procedure, with the reach of the permanent exemptions, or with other parts of § 1201, opponents urged them to lobby Congress for changes. Testifying on behalf of the DVD Copy Control Association, Bruce Turnbull said exactly this. “Congress provided a specific exemption for research purpose [*sic*] and did not in that exemption permit the Librarian through this proceeding or otherwise to modify or extend that statutory exemption. The requester should properly address their pleas to Congress.”<sup>189</sup> Rather than engaging the broader policy debate, opponents insisted that the proceedings were not the proper venue for such considerations.

In stark contrast to the high frequency of opponents’ venue-specific arguments, proponents rarely made such claims. As perhaps the most noteworthy example, consider the argument that the Register must weigh the bill’s harms to noninfringing users against the harm that a proposed exemption would do to the class of copyrighted works that were exempted. The statute—generally thin on guidance for the rules of the proceedings—explicitly requires this calculation.<sup>190</sup> As part of their claims about legislative intent, thirteen out of thirty-eight opponents (34%) explicitly made this point, while just two of the sixty proponents do.<sup>191</sup> This claim is not problematic for proponents—a realistic refutation of copyright holders’ doomsday scenarios of wide scale infringement, especially infringement that is uniquely attributed to a new exemption, is an important and persuasive argument.

Proponents were also unlikely to engage in arguments about the burden of proof, even though this is a fundamental strategy in an adversarial context.<sup>192</sup> Only seven documents contended that the burden of proof should be possible, reasonable, or in any way less than the insurmountable hurdle described by opponents. Just six insisted that they had met their burden of proof.

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<sup>189</sup> *Rulemaking Hearing: Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works* at 49 (May 2, 2003) (statement of Bruce Turnbull, counsel, DVD Copy Control Association), <http://www.copyright.gov/1201/2003/hearings/transcript-may2.pdf>.

<sup>190</sup> 17 U.S.C. § 1201(a)(1)(C) (2004).

<sup>191</sup> One of these two documents is by Ernest Miller, a fellow of the Information Society Project at Yale Law School. Ernest Miller, 2003 Comment, <http://www.copyright.gov/1201/2003/comments/021.pdf> (last visited Oct. 27, 2005). Miller’s submission thoroughly refutes opponents’ disadvantage scenarios, and future exemption advocates would be wise to follow his model. Nonetheless, Miller’s proposed exemption, for Ancillary audiovisual works distributed on DVDs using the Content Scrambling System (CSS) of access control, was rejected. See *infra*, Part IV.C.2.

<sup>192</sup> See, e.g., MARK CROSSMAN, *BURDEN OF PROOF: AN INTRODUCTION TO ARGUMENTATION AND GUIDE TO PARLIAMENTARY DEBATE* (2005).

### 3. Class of Works

In addition to routinely making claims about the rulemaking's proper jurisdiction and procedures, opponents dismissed a number of proposed exemptions based on arguments about what legitimately constituted "a particular class of copyrighted works."<sup>193</sup> In sixteen documents, opponents argued that a proposed class of works was too broadly drawn. This criticism was most often deployed in response to proposals that were aimed at deligitimizing the entire law—for instance, the proposed exemption for "everything" contained in one 2003 submission.<sup>194</sup> Reid Elsevier witness Christopher Mohr established the norm in this regard: "[t]hese proposals invite not the promulgation of an exception to a statute, but a regulatory repeal of it."<sup>195</sup>

An additional nine documents dismissed a proposed class as being based on the traits of users and/or the intended uses of copyrighted materials. Instead, these opponents insisted, the proceedings should have served only to determine a class of copyrighted works as defined in terms of the traits of the works themselves. Consider this example by Metalitz:

Seventh, many submissions fail to properly distinguish between "particular classes" of works" and particular (or general) categories of users. The former classification is the focus of this proceeding; the latter is not . . . . The distinction has a practical impact in this proceeding. Assertions that the prohibition should not go into effect with respect to libraries, with respect to archives, or with respect to any other identified category of users, answer a question that Congress has not asked.<sup>196</sup>

As with jurisdictional and procedural claims, proponents were also fairly unlikely to engage the definitional debate about the proper shape of a class of works. Their claims on this point did, however, represent an interesting contest over the purpose of the rulemaking. In their most common claim on this point, just eleven proponents urged an exemption based on the intended use and/or characteristics of the would-be user. In ten documents,

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<sup>193</sup> 17 U.S.C. § 1201(a)(1)(C) (2004).

<sup>194</sup> Allen Cook, 2003 Reply Comment, <http://www.copyright.gov/1201/2003/comments/043.pdf> (last visited Oct. 27, 2005). Cook's one page submission is actually an underdeveloped complaint about the statute generally. While there are exceptions, his is the norm among the documents we excluded from initial consideration due to their brevity. We reference his submission here because Mohr, *infra* note 195, specifically addresses it.

<sup>195</sup> Christopher Mohr, 2003 Reply Comment at 10, <http://www.copyright.gov/1201/2003/reply/022.pdf> (last visited Oct. 27, 2005).

<sup>196</sup> Metalitz, 2000 Reply Comment, *supra* note 169, at 10.

proponents argued that the statute authorizes the granting of exemptions on such grounds. John C. Vaughn, Vice President of the Association of American Universities, made this point very explicitly:

In short, section 1201 requires the Office to undertake this rulemaking in the context of particular users of particular classes of copyrighted works. The Act gives the Office the authority to define an exemption in terms of users as well as classes of works. Indeed, it would be contrary to law not to define the exemption in terms of users as well as classes of works.<sup>197</sup>

On this point, at least more than a few proponents and opponents assumed that they had finally found a legal point of direct contention. As we shall see later, however, the Register of Copyrights and Librarian of Congress believed there was no debate to be had on this point.

### *C. Final Recommendations and Rulings*

Perhaps even more remarkable than this stark division between exemption proponents and opponents is the palpable sense that the language of the final rulings more closely resembles the anti-exemption side of the debate. In 2000<sup>198</sup> and 2003,<sup>199</sup> the Register and the Librarian of Congress published jointly issued rulings in the Federal Register in which Peters constructed most of the document and James H. Billington, the Librarian, merely cemented the exemptions. Additionally, a much longer letter from Peters to Billington explained her recommendations following the 2003 rulemaking.<sup>200</sup> The documents each featured sections providing background, explaining the purpose and rules for the rulemaking, responding to feedback from the Assistant Secretary of Commerce, accepting or denying specific proposed exemptions, and making overall observations; in total, they contain ninety-nine such sections. In the list of arguments from the final rulings

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<sup>197</sup> John C. Vaughn, 2000 Post-Hearing Comment, at 7 (June 23, 2000), <http://www.copyright.gov/1201/post-hearing/vaughn.pdf>.

<sup>198</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Final Rule, 65 Fed. Reg. 64,556 (Oct. 27, 2000), *available at* <http://www.copyright.gov/fedreg/2000/65fr64555.pdf> [hereinafter 2000 Ruling].

<sup>199</sup> Copyright Office: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Final Rule, 68 Fed. Reg. 62,011 (Oct. 31, 2003), *available at* <http://www.copyright.gov/fedreg/2003/68fr2011.pdf> [hereinafter 2003 Ruling].

<sup>200</sup> Letter from Marybeth Peters, Register of Copyrights, to James H. Billington, Librarian of Congress (Oct. 27, 2003), <http://www.copyright.gov/1201/docs/register-recommendation.pdf> [hereinafter 2003 Recommendations].

ranked according to frequency, illustrated in Table 6, anti-exemption arguments clearly dominate.

TABLE 6: PRO- OR ANTI-EXEMPTION RHETORIC IN FINAL RULINGS DOCUMENTS

Argument	# of Sections Featuring the Argument			
	2000 Final Ruling	2003 Register's Recommendations	2003 Final Ruling	Total
‡ Pro-exemption arguments fail burden of proof	12	24	21	57
‡ Cited pro-exemption arguments are irrelevant in this venue	10	16	11	37
‡ Must weigh decline in creative output against harms to noninfringing users	4	11	7	22
* Alternative (e.g., analog) formats remove the need for an exemption	2	9	8	19
* Proposed exemption threatens content production	4	9	4	17
+ A proposed class of works is too broad	5	8	3	16
+ A proposed class is wrongly based on traits of users, not of the works themselves	5	7	4	16
‡ Burden of proof is on those who propose exemptions	3	9	3	15
* § 1201 intends to preserve fair use	4	6	3	13
+ Proposed class of works is defined properly	1	7	3	11
* Without an exemption, § 1201 will shrink fair use	2	4	4	10
‡ The pro-exemption side meets its burden of proof	3	4	3	10
Exemptions Approved/Denied	2/10	4/25	4/25	6/35 <sup>201</sup>
Total Number of Sections	22	38	39	99

\* = Public policy goals/outcomes

‡ = Jurisdictional/procedural

+ = Class of works

In discussing the Register's rhetorical patterns, we first discuss the most common argument—that proponents failed to meet their burden of proof—as illustrated in one case where that was Peters' sole justification for rejecting a proposal. Next, we consider how this argument fit into a more complicated rejection featuring several other arguments. Third, we examine Peters' dismissal of certain proposals because they did not properly define a "class of works" to be exempted. Fourth, we consider how this and other

<sup>201</sup> Both 2003 documents consider the same proposed exemptions; their totals therefore match and we only count one set in the final total.

justifications were used in sending many proponents to seek remedies in other venues. Fifth, we identify some of the major characteristics of her support for exemptions. Finally, we use one of the four exemptions granted in 2003 to further illustrate some of the central arguments that Peters used to justify exemptions.

### 1. Failed Burden of Proof

As with opponents' documents, the final rulings were filled with jurisdictional and procedural dismissals of proposed exemptions; these constituted the top three claims as aggregated across the final rulings documents. In easily the most common claim—featured in fifty-seven sections spread across the three documents—the Register repeatedly concluded that exemption proponents had failed to meet their burden of proof. In addition to noting its frequency, this argument is worth examining in some detail because it speaks to the Register's underlying intent. Peters summarized one proposal as “[v]ideo games stored on DVDs that are not available in Region 1 DVD format.”<sup>202</sup> The petitioner articulated problems in accessing domestically unavailable Playstation 2 games with foreign region codings.<sup>203</sup> He also explains the act of circumvention that would enable him to access these games.<sup>204</sup> In less than a page, Peters dismissed the proposal as needing “more and better evidence in order to sustain the proposed exemption.”<sup>205</sup> She did so by reference to the 2000 rulemaking, in which she contended that the “few comments that mentioned this issue do not rise to the level of substantial adverse affect [*sic*] that would warrant an exemption for video games.”<sup>206</sup> Yet the statute did not require the demonstration that one has been *substantially* affected.

The final statute demands that the rulemaking exempt from the basic ban persons who are “adversely affected by virtue of such prohibition in their ability to make noninfringing uses”<sup>207</sup> of

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<sup>202</sup> *Id.* at 124.

<sup>203</sup> Ken Arromdee, 2003 Comment, 5-6, <http://www.copyright.gov/1201/2003/comments/015.pdf> (last visited Oct. 27, 2005).

<sup>204</sup> *Id.* at 6. While we sympathize with this gaming enthusiast's plight, this is a less-than-ideal proposal for an exemption and our contention is not that a fair interpretation of the statute would necessarily lead to an exemption based on this comment alone. Rather, this is one of the few rejected exemptions in which Peters relies solely on the argument that the proponent has failed his burden of proof. This proposed exemption is therefore ideal for illustrating the “failed burden” argument in action without also explaining its use in the context of other arguments.

<sup>205</sup> 2003 Recommendations, *supra* note 200, at 124.

<sup>206</sup> 2000 Ruling, *supra* note 198, at 64,570.

<sup>207</sup> 17 U.S.C. § 1201(a)(1)(B) (2004).

copyrighted works that are wrapped in access-controlling TPMs. The statute does not mandate that adversely affected users carry the burden of proof, and it certainly does not propose a measurable standard for the assessment of that burden. Yet Peters, in issuing the 1999 notice of inquiry, argued the following:

It is clear from the legislative history that a determination to exempt a class of works from the prohibition on circumvention must be based on a determination that the prohibition has a substantial adverse effect on noninfringing use of that particular class of works. The Commerce Committee noted that the rulemaking proceeding is to focus on “distinct, verifiable, and measurable impacts, and should not be based upon *de minimis* impacts.” . . . Similarly, the Manager’s Report . . . suggested that “mere inconveniences, or individual cases . . . do not rise to the level of a substantial adverse impact.”<sup>208</sup>

These citations do not tell the entire story of the act’s legislative history, and they appear to create a burden of proof that is higher than that required by either the statute or a full reading of the legislative history.

As discussed above, the Commerce Report continued to discuss the hearing, implying that the burden of proof was fairly reasonable. “Only in categories as to which the Secretary finds that adverse impacts have occurred, or that such impacts are likely to occur within the next two years, should he or she waive the applicability of the regulations for the next two years.”<sup>209</sup> This implies that the burden of proof is merely one of demonstrating some measurable adverse effect; the word “substantial” is simply not present.

Peters did not discuss this part of the report, even though it is on the very next page after the section she cites.<sup>210</sup> Peters also did not quote the part of the committee report that demanded that the person running the rulemaking “consult closely” with other consultative officials such as the Administrator of the National

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<sup>208</sup> *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Notice of Inquiry*, 64 Fed. Reg. 66,139, 66,141 (Nov. 24, 1999) (citations omitted), available at <http://www.copyright.gov/fedreg/1999/64fr66139.pdf>, [hereinafter 1999 NOI].

<sup>209</sup> H.R. REP. NO. 105-551, pt. 2, at 38 (2005). The Register does quote the first half of this sentence in the 2000 Ruling, *supra* note 198, at 64,560, yet Peters cites it only to buttress her requirement that a class of works be a subset of a section 102(a) category. The full implication of this entire sentence, that the demonstration of adverse impact—no qualifier necessary—on noninfringing users of a particular class should generally lead to an exemption, is simply not discussed.

<sup>210</sup> *Id.* at 37.



Telecommunications and Information Administration (NTIA),<sup>211</sup> who also concluded that the standard of substantial adverse effect is not present in the legislative history.<sup>212</sup> Here, although Peters did consult repeatedly with the Assistant Secretary and report the NTIA's objections as required by the statute,<sup>213</sup> she rejected the Assistant Secretary's objections and insisted that the standard of substantiality should stay. She based her reasoning on the above-cited interpretation of the Commerce report and on the House Manager's Report.

Peters' heavy reliance on the House Manager's Report,<sup>214</sup> written by the House Judiciary Committee *after* the bill was passed by the full House, foreshadowed her eagerness to construct a relatively high burden of proof for proponents. The Judiciary Committee, as authors of the report, wanted a stricter ban than the one that resulted from Conference Committee and was passed by the full House and Senate, so it was hardly surprising that the Committee's interpretation of the statute would construct the rulemaking as heavily stacked against any exemptions. Yet this report should not be treated as part of the legislative history of the Act. In addition to its *post hoc* construction, the Library of Congress's own website for tracking legislative histories makes *no mention* of the report.<sup>215</sup>

The Register relied upon a dubious representation of legislative intent. Indeed, in the 2000 final ruling, she acknowledged that some have objected to reliance on the House Manager's Report. She suggested only that:

because that report is consistent with the Commerce Committee Report, there is no need in this rulemaking to determine whether the Manager's Report is entitled to less weight than the Commerce Committee's Report. Some critics of the Manager's Report have objected to its statement that the focus of this proceeding should be on whether there is a "substantial adverse

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<sup>211</sup> *Id.*

<sup>212</sup> 2000 Ruling, *supra* note 198, at 64,562. While a categorical claim of this sort is virtually impossible to substantiate, we believe that few if any other recent, visible public debates about legislative intent have seriously considered—let alone turned on—a House manager's report.

<sup>213</sup> *Id.* at 64,561.

<sup>214</sup> Staff of House Committee on the Judiciary, 105th Cong., Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998, *available at* [http://ipmall.info/hosted\\_resources/lipa/copyrights/SECTION-BY-SECTION%20ANALYSIS.pdf](http://ipmall.info/hosted_resources/lipa/copyrights/SECTION-BY-SECTION%20ANALYSIS.pdf) [hereinafter House Manager's Report].

<sup>215</sup> Library of Congress, *Thomas: Legislative Information on the Internet*, at <http://thomas.loc.gov/> (searched for H.R. 2281 in the 105th Congress; chose "Bill Summary and Status File"; chose "All Information (except text)"; found no mention of House Manager's Report, *supra* note 214) (last visited Oct. 27, 2005).

impact” on noninfringing uses. However, they have failed to explain how this statement is anything other than another way of saying what the Commerce Committee said when it said the determination should be based on “distinct, verifiable, and measurable impacts, and should not be based upon *de minimis* impacts.”<sup>216</sup>

Peters transposed the notion of substantiality from one context (level of proof) to another (level of impact) in order to create the illusion that proponents must prove a substantial adverse impact. The Commerce Committee report can reasonably be read to require substantial proof—distinct, verifiable, and measurable impacts. But the category of “adverse impacts that are not *de minimis*” is hardly coextensive with the category of “substantial adverse impacts.”

Individual cases are perhaps the best illustration of this difference. Imagine that just one citizen demonstrates her inability to access, in any way and in an otherwise legal manner, one type of TPM-protected media. Imagine further that she demonstrates that this inability is verifiably perpetuated by the legal prohibition on circumventing access control technologies. Her inability to access a given media artifact is no mere *de minimis* impact, yet as the House Manager’s Report insisted, “individual cases . . . do not rise to the level of a substantial adverse impact.”<sup>217</sup>

In her 1999 NOI, Peters cited this phrase as illustrative of the burden of proof.<sup>218</sup> Peters relied upon the Commerce directive to demand substantial *proof* as evidence that the Commerce Committee established a requirement for significant *impacts* on a substantial number of people.

The same discussion ensued between NTIA and the Register in 2003. Assistant Secretary Nancy J. Victory argued, “the standard set forth in the Notice of Inquiry (the “NOI”) imposes a significantly heightened burden on proponents of an exemption, and is therefore inconsistent with the opportunity that Congress intended to afford the user community.”<sup>219</sup> In response, the Register insisted:

Because it appears that the Assistant Secretary (among others)

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<sup>216</sup> 2000 Ruling, *supra* note 198, at 64,558, note 4.

<sup>217</sup> House Manager’s Report, *supra* note 214, at 6.

<sup>218</sup> 1999 NOI, *supra* note 208, at 66,141.

<sup>219</sup> Letter from Nancy J. Victory, Assistant Secretary of Comm. for Communications and Information and Administrator of National Telecommunications and Information Administration, to Marybeth Peters, Register of Copyrights, ¶18 (August 11, 2003), [http://www.ntia.doc.gov/ntiahome/occ/dmca/dmca2003/dmcaletter\\_08112003.html](http://www.ntia.doc.gov/ntiahome/occ/dmca/dmca2003/dmcaletter_08112003.html).

has in some respects misapprehended what was said in the NOI, it is pertinent to offer some additional clarification. It appears that the use of the term “substantial” in the NOI and in the Register’s recommendation in 2000 has caused undue alarm . . . . The phrase “substantial adverse impact,” as quoted from the House Manager’s Report in the previous recommendation and the NOI, has been mischaracterized by many commenters, including both proponents and opponents of exemptions, as requiring a high standard of proof.<sup>220</sup>

Rather than imposing a heightened burden of proof, Peters insisted that she used the standard of substantiality as a means of clarifying and summarizing what she characterized as agreement between the Commerce report and the House Manager’s Report regarding the level of proof. This may have been somewhat reassuring to proponents, and we must admit that such a claim would be inconceivable if Bruce Lehman had been in charge of the rulemaking. Yet in later parts of the same recommendations, she demonstrated that the standard of substantiality, as defined by the House Manager’s Report, did indeed matter.<sup>221</sup>

In the case of the proposed exemption for video games that were only available on non-Region 1 DVDs, Peters identified the proponent’s failure to meet his burden of proof and she dismissed the weight of a single person’s case as inadequate. Even if the commenter had documented more personal cases in more adequate detail—even if he had done enough to reasonably demonstrate to her satisfaction that an access-controlling TPM was preventing him from making lawful uses of lawfully acquired media—she almost certainly still would have dismissed his case as just one individual example.

## 2. “Failed Burden” within a Larger Argument

Having established the burden of demonstrating substantial adverse effect, Peters dismissed the vast majority of proposed exemptions as failing on at least this count. She used this tool even when a substantial record demonstrated a reduced ability to make noninfringing uses, though in these cases she combined this argument with others. Consider Peters’ 2003 rejection of the carefully reasoned proposal to exempt “[a]ncillary audiovisual

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<sup>220</sup> 2003 Recommendations, *supra* note 200, at 16.

<sup>221</sup> We believe that the best demonstration of this standard’s use to deny an exemption that is indeed based in substantially demonstrable adverse impacts is in the 2003 denial of the proposal to exempt ancillary audiovisual works distributed on DVDs encrypted by CSS. See discussion *infra* Part IV.C.2.

works distributed on DVDs encrypted by CSS.”<sup>222</sup> Peters granted that such ancillary materials, such as out-takes, were often unavailable on unencrypted media such as VHS<sup>223</sup> and that “the desired use for comment and criticism by weblog critics can be within the fair use exception.”<sup>224</sup> But, she insisted that there were alternative, analog solutions. These analog solutions included circumventing the Macrovision copy control on the analog output of one’s DVD player and videotaping one’s television screen. She acknowledged that the difference between analog-quality and digital-quality reproduction mattered to many videophiles, but dismissed this difference as insubstantial:

[W]ithout specific information about why this digital content is necessary for the purpose, without information about what type of audiovisual or ancillary work is needed for this purpose, and without specific information about the purpose and character of the use, it is impossible to assess the merits of the proposal.<sup>225</sup>

Peters apparently believed that quality of reproduction was the primary—perhaps the only—reason to prefer digital-to-digital reproduction. She ignored much of the sophisticated legal reasoning offered by the proposal’s main advocate, Ernest Miller, a fellow of the Information Society Project at Yale Law School. As Miller elaborated:

In order to publish such multimedia reviews on the Internet, all that is required is a computer with a DVD drive and an Internet connection, much like this author’s laptop. However, a determination that alternate means to quote the work exist would create additional barriers. For example, rather than simply use the laptop, the author of this comment would have to invest in an external DVD player and external television tuner that could convert that analog television signal into an appropriate format that the laptop could understand. Possible, yes, but expensive and a barrier to the author’s free exercise of First Amendment rights.<sup>226</sup>

For Peters to have casually dismissed Miller’s argument as failing to meet the burden of proving substantial adverse effect, without addressing his claim that unnecessary expenses constitute a barrier to exercising one’s First Amendment rights, was an oversight at

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<sup>222</sup> 2003 Recommendations, *supra* note 200, at 115 (writing primarily in response to Miller, *supra* note 191).

<sup>223</sup> *Id.* at 115.

<sup>224</sup> *Id.* at 116.

<sup>225</sup> *Id.* at 118.

<sup>226</sup> Miller, *supra* note 191, at 13.

best. Yet Peters insisted that Miller has failed to meet his burden of proving substantial adverse impact.<sup>227</sup>

Peters also presented an unrealistically negative vision of the potential decline in content production that would result from an exemption. Miller insisted that, just as the Register can only consider adverse effects on noninfringing users that are directly attributable to the basic ban, she could also only consider the negative effects on content production that would be directly attributable to a proposed exemption from the basic ban. Because she is unable to make a ruling affecting either trafficking ban, Miller argued, “any harms that flow from the existence of circumvention devices cannot be considered.”<sup>228</sup> Despite this obvious statutory mandate, Miller claimed that the Register’s 2000 dismissal of the proposal to exempt audiovisual works on DVDs was defended in part based on the prior existence of DeCSS, a hack for defeating CSS.<sup>229</sup> Arguably, it was well beyond Peters’ statutory mandate, which permitted her only to examine the negative impacts of exemptions to the basic ban.<sup>230</sup> It also appears to have been in disregard of the rulemaking’s inability to provide “a defense in any action to enforce any provision of this title other than this paragraph,”<sup>231</sup> despite Peters’ explicit reference to this inability at a later point in her 2003 recommendations.<sup>232</sup>

Miller used this demand that the rulemaking set aside all concerns resulting from the trafficking in circumvention devices—as well as from infringing circumventions, which would also not be protected—to build a strong case that his proposed exemption would have virtually no negative impact on the value of copyrighted works:

The exemption will only apply to noninfringing uses of the ancillary materials on lawfully acquired DVDs. If an individual infringes on the copyright of the ancillary materials, the exemption does not apply. If the individual trafficks [*sic*] in a circumvention device, the exemption will not apply to that act. For the motion picture studios to prevail in this rulemaking, they will have to make a showing as to why the act of circumventing access control devices for noninfringing uses of

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<sup>227</sup> 2003 Recommendations, *supra* note 200, at 119.

<sup>228</sup> Miller, *supra* note 191, at 18.

<sup>229</sup> *Id.* at 18 (citing 2000 Ruling, *supra* note 198, at 64,570).

<sup>230</sup> 17 U.S.C. § 1201(a)(1)(C)(iv) (2005) (concluding that the rulemaking must consider, as one of five factors, “the effect of circumvention of technological measures on the market for or value of copyrighted works.”).

<sup>231</sup> 17 U.S.C. § 1201(a)(1)(E) (2004).

<sup>232</sup> 2003 Recommendations, *supra* note 200, at 196.

physical media, lawfully acquired, is harmful to the value of or market for their works. This they cannot do.<sup>233</sup>

This demand for hard proof of measurable negative impacts from the proposed circumvention was simply never met. Quite the contrary, the movie industry's response pretended that the value of CSS generally stands as a counterargument to granting the proposed, narrow exemption. Their reply comment proudly cited the Register's 2000 conclusion "that 'the availability of access control measures has resulted in greater availability of these materials,' and this remains the case today. Indeed, many of these [ancillary] works would never have been created but for the prospect that they would be distributed on a DVD protected by CSS."<sup>234</sup> This argument that CSS is important in general is not necessarily a reason to dismiss a narrowly defined exemption from the basic ban. In opposing this exemption, Peters perpetuates the artificial connection between Miller's narrow proposal and broader threats of piracy.<sup>235</sup>

While this was just one proposal, it demonstrated Peters' willingness to deploy a combination of her most common anti-exemption arguments to refute a solid proposal. Even if there was a noninfringing use at stake, any alternative solutions—even if suboptimal and unnecessarily expensive—severely reduced the need for an exemption (Peters' fourth most common argument; see Table 6). Any proposed benefit to noninfringing users must be weighed against the potentially diminished creative output (third), and this threat was taken to be real (fifth) despite flimsy links to a given proposal. Because the pro-exemption side faces the burden of proof (eighth), and they failed to meet this burden (first) in demonstrating substantial harm, she reasoned, the exemption was denied.

### 3. Improperly Defined Class of Works

The Register also dismissed a number of proposals for improperly defining a class of works to be exempted. In two familiar arguments, she declared that many proposed classes are either too broad or are wrongly defined in terms of types of users or their intended uses. As the statute mandates:

<sup>233</sup> Miller, *supra* note 191, at 19.

<sup>234</sup> Metalitz & Schwartz, 2003 Reply Comment, *supra* note 169, at 36.

<sup>235</sup> 2003 Recommendations, *supra* note 200, at 118 (concluding, that "[g]iven the risks of unauthorized reproduction and distribution over the Internet, it is obvious that a compelling case would have to be made in order to outweigh the potential adverse effects.").

The prohibition contained in subparagraph (A) shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title, as determined under subparagraph (C).<sup>236</sup>

The definition of the phrase “particular class of works” was hotly contested. The Register’s 1999 notice of inquiry relied upon the House Manager’s Report, concluding “that the scope of ‘class of works’ is narrower than the category of works set forth in 17 U.S.C. 102(a).”<sup>237</sup> Within the assumption that a class of works should be a subset of the categories of works that are available for copyright protection, the Register’s reasoning was relatively sound. A few of these categories are: literary works, musical compositions, motion pictures, and sound recordings. The Register used the category of literary works to illustrate the potentially broad-ranging reach of an exemption class that is coextensive with one of the eight categories. Within it, “one finds prose journals, periodicals, and books as well as computer programs, and . . . it is unlikely that the impact on [*sic*] prohibiting circumvention of access control technologies will be the same for scientific journals as it is for computer operating systems.”<sup>238</sup> Yet the statute does not mandate that particular classes of works be defined purely in terms of the traits of the works themselves. As noted above, some participants in the rulemaking contended vociferously that the traits of the intended users are a valid and important part of any workable definition of a class of works.

Participants were not the only voices arguing for classes of works based upon the traits of users or their intended uses. Gregory L. Rohde, Assistant Secretary of Commerce for Communications and Information and Administrator of the National Telecommunications and Information Administration (NTIA), also used his consultative role to make the same push. In light of the 1999 NOI, Rohde’s 2000 consultative letter specifically challenged the Register’s interpretation and insisted, “the definition of classes of works is not bounded by limitations imposed by Section 102(a) of the Copyright Act, but incorporates an examination of the ‘noninfringing uses’ of the copyrighted

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<sup>236</sup> 17 U.S.C. § 1201(a)(1)(B) (2004).

<sup>237</sup> 1999 NOI, *supra* note 208, at 66,142.

<sup>238</sup> *Id.* at 66,142.

materials.”<sup>239</sup> In addition to pleading for a general reframing of the requirements for such classes, Rohde supported the class proposed by the library communities,<sup>240</sup> which would exempt “[w]orks embodied in copies that have been lawfully acquired by users or their institutions who subsequently seek to make noninfringing use thereof.”<sup>241</sup> This would exempt a large number of works from across a host of section 102(a) categories of works, a much broader interpretation of the power of the exemption hearings than that defended by the Register. Note that Rohde made this argument of administrative authority through heavy appeal to the Commerce Report and to that committee’s role in having added the rulemaking to the statute.<sup>242</sup> As one would expect, the Register noted this alternate reading of the statute, strongly disagreed, and insisted that a class of works must be defined in terms of the attributes of the works themselves.<sup>243</sup>

In 2003, Assistant Secretary Nancy J. Victory also urged Peters to create classes of works based in part on the attributes of uses or users, but this plea diverged less from Peters’ definitional requirements than did Rohde’s letter. Victory agreed that proponents must choose a section 102 category as the starting point for defining a particular class of works. Nonetheless, she argued:

[I]n some circumstances, the intended use of the work or the attributes of the user are critical to a determination whether to allow circumvention of a technological access control. Section 1201(a)(1) is, however, silent regarding the manner in which and by what criteria “class of works” may be further defined.<sup>244</sup>

While acknowledging this request, Peters provided no direct response to it.<sup>245</sup> Rather, she simply dismissed the possibility that works could be exempted based on the type of user or use.<sup>246</sup>

This additional burden in hand, Peters dismissed eleven of thirty-five proposed exemptions for failing to properly define a class of works. In her 2000 denial of the proposed exemption for

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<sup>239</sup> Letter from Gregory L. Rohde, Assistant Secretary of Commerce for Communications and Information and Administrator of National Telecommunications and Information Administration, to Marybeth Peters, Register of Copyrights, 4 (Sept. 29, 2000), *available at* <http://www.copyright.gov/1201/commerce.pdf>.

<sup>240</sup> Miriam M. Nisbet, 2000 Comment, <http://www.copyright.gov/1201/comments/162.pdf> (last visited Oct. 27, 2005).

<sup>241</sup> Rohde, *supra* note 239, at 4.

<sup>242</sup> *Id.* at 3.

<sup>243</sup> 2000 Ruling, *supra* note 198, at 64,562.

<sup>244</sup> Victory, *supra* note 219, at ¶17.

<sup>245</sup> 2003 Recommendations, *supra* note 200, at 15.

<sup>246</sup> *Id.* at 13.



“material that cannot be archived or preserved,” the comment that this failed to constitute an acceptable class of works was just the brief beginning to a multi-pointed rejection.<sup>247</sup> The same was true of her rejection of “works embodied in copies which have been lawfully acquired by users who subsequently seek to make non-infringing uses thereof.”<sup>248</sup> In these and several other instances, Peters briefly commented that there was no acceptable class of works, and she then spent far more time identifying the failure to demonstrate harms that were due to TPMs. In some cases, however—for example, her 2003 dismissal of proposals for “all works”<sup>249</sup> and “fair use works”<sup>250</sup>—she relied almost exclusively on this reasoning. As part of the latter denial, she referred would-be proponents elsewhere. “It is also of note that several bills currently before Congress incorporate use-based revisions of section 1201. If Congress finds that an expansion to [*sic*] the existing statutory exemptions is warranted, it will accomplish that through legislation.”<sup>251</sup> In this place as well as many others, Peters, the overseer of the congressional “solution,” threw her hands up at her inability to solve the problem and referred the proponents back to Congress.

#### 4. Cited Pro-Exemption Arguments Are Irrelevant in this Venue.

In the second-most-common argument, the Register regularly insisted that exemption proponents missed the point of the proceeding. Peters used this reasoning in rebutting the NTIA’s 2000 support for the library associations’ proposal<sup>252</sup> and in sternly lecturing proponents *en masse* in the 2000 final ruling. She also used this reasoning in at least part of her justification for almost two thirds of denied exemptions (22 of 35). Most remarkably, she insists that proponents of two different *granted* exemptions also provided arguments that exceeded the mandate of the rulemaking. We discuss each of these in turn.

First, consider the Register’s insistence that the NTIA’s support for the library associations’ proposal to exempt lawfully acquired works for noninfringing uses missed the point of the hearings. She believed this approach “would, in effect, revive a

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<sup>247</sup> 2000 Ruling, *supra* note 198, at 64,572.

<sup>248</sup> *Id.* at 64,572-73.

<sup>249</sup> 2003 Recommendations, *supra* note 200, at 82.

<sup>250</sup> *Id.* at 84.

<sup>251</sup> *Id.* at 85.

<sup>252</sup> Nisbet, *supra* note 240, at 35.

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version of § 1201(a)(1) focusing on persons who have gained initial lawful access that was initially enacted by the House of Representatives but ultimately rejected by Congress.”<sup>253</sup> For this and other reasons, she rejected the exemption as “beyond the scope of the Librarian’s authority.”<sup>254</sup> Peters did not here dismiss the librarians’ proposal<sup>255</sup> as a bad policy decision, but rather takes umbrage at her ability to implement in light of her legislative authority. She even offers a ray of hope for its advocates:

Some of the issues raised by the Assistant Secretary are also likely to be addressed in a joint study by the Assistant Secretary and the Register pursuant to section 104 of the DMCA. See 65 FR 35673 (June 5, 2000). It is possible that this study will result in legislative recommendations that might more appropriately resolve the issues raised by the Assistant Secretary.<sup>256</sup>

While the Register expressed some sympathy, she argued that she does not have the power to implement the proposed exemption. This claim was based largely on the belief that the proposal failed to properly define a class of works. If proponents are concerned about a broader problem that cuts across many classes of works, she implied, they should talk to Congress.

Second, the Register rejected a solid majority of proposed exemptions as, at least in part, missing the point of the rulemaking. In her 2003 recommendations, she created the final category of denied exemptions around this theme. “A number of comments discussed issues unrelated to the anticircumvention provision that is the focus of this rulemaking.”<sup>257</sup> Into this category she grouped proposals that oppose § 1201 or the DMCA generally, oppose unrelated sections of the DMCA, or oppose the antitrafficking provisions. These proposed exemptions were clearly outside the rulemaking authority granted by the statute, and the Register confidently rejected them on these grounds alone. In other cases, however, she combined this reasoning with other objections to denied exemptions; this was quite often related to the argument that proponents have improperly defined a class of works. For instance, she denied a 2000 proposal for archival materials because it was a use-based proposal that cut across many classes of works, and she elaborated that her hands are tied in this situation. “The

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<sup>253</sup> 2000 Ruling, *supra* note 198, at 64,562.

<sup>254</sup> *Id.*

<sup>255</sup> Nisbet, *supra* note 240.

<sup>256</sup> 2000 Ruling, *supra* note 198, at 64,562.

<sup>257</sup> 2003 Recommendations, *supra* note 200, at 195.

Office is limited to recommending only particular classes”<sup>258</sup> of works, she insisted. In 2003, she adopted even stronger language in rejecting several classes, “including ‘*per se* educational fair use works’ and ‘fair use works.’”<sup>259</sup> Peters elaborated:

A “use-based” or “user-based” classification was rejected by the Register in the last rulemaking, because the statutory language and the legislative history did not provide support for classification on this basis. Defining a class in such a manner would make it applicable to all works and would not provide any distinctions between varying types of works or the measures protecting them. If an exemption encompassing all works is to be granted, it is more appropriately a matter for Congressional action.<sup>260</sup>

This was a fairly common theme; the Register often insisted that she has no power to help proponents and referred them to Congress for a redress of their grievances. She also referred proponents to the courts, albeit less frequently.<sup>261</sup> While rejecting at least one exemption each year, she noted that the problem of dual-purpose TPMs is regrettable but not her jurisdiction. In 2000, for instance, her rejection of the proposal to exempt DVDs stated that Congress would be a better venue and implied that even the courts would be more appropriate:

The merger of technological measures that protect access and copying does not appear to have been anticipated by Congress . . . . [N]either the language of section 1201 nor the legislative history addresses the possibility of access controls that also restrict use. It is unclear how a court might address this issue. It would be helpful if Congress were to clarify its intent . . . .<sup>262</sup>

In this case and others, Peters implied that she sympathizes with proponents but believes she is powerless to help them.

Perhaps more remarkably, the Register twice referred to

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<sup>258</sup> 2000 Ruling, *supra* note 198, at 64,572.

<sup>259</sup> 2003 Recommendations, *supra* note 200, at 85.

<sup>260</sup> *Id.*

<sup>261</sup> *E.g., id.* at 150. In response to a proposed exemption for works subject to End User License Agreements (EULAs), the Register observes:

[t]he primary concern of the commenter appears to be contractual overreaching . . . . If these terms are, as the commenter suggests, ‘beyond the limits imposed by Congress’ or are a ‘misuse’ of copyright, such preemption or misuse determination can still be made in a court . . . . These determinations of preemption and misuse are, without question, beyond the scope of this rulemaking . . . .

*Id.*

<sup>262</sup> 2000 Ruling, *supra* note 198, at 64,568.

arguments for *granted* exemptions as reaching beyond the scope of the rulemaking. First, in granting an exemption in 2000 for “literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence,”<sup>263</sup> the Register noted that the reasoning would equally apply to any such works where access is denied by failed TPMs:

Although this exemption fits within the parameters of the term “class of works” as described by Congress, it probably reaches the limits of those parameters . . . . [I]n reality, this exemption addresses a problem that could be experienced by users in accessing all classes of copyrighted works. This subject matter is probably more suitable for a legislative exemption, and the Register recommends that Congress consider amending section 1201 to provide a statutory exemption . . . .<sup>264</sup>

The Register sounded a similar note in 2003 while supporting the exemption designed to aid the preservation of computer programs and video games in obsolete formats:

In essence, the problem confronting archival activity in the digital age is a “use-based” concern that is more appropriate for congressional consideration and properly crafted legislative amendment than it is for this rulemaking . . . . [T]here is a tension created by the DMCA that is likely to grow and that should be considered by Congress in a comprehensive fashion. Although the remedy is beyond the scope of this rulemaking since it is a problem that relates to all digital works and is a problem that is not resolved by three-year exemptions, the potential adverse consequences raise serious concerns . . . . At present, and due to the limitations of the § 1201 rulemaking process, the Register finds that the problem established in the record can best be addressed in this rulemaking by exempting the recommended class.<sup>265</sup>

In both of the above cases, the Register acknowledged some of the innocent casualties of the legislation, yet she insisted that she is not able to address these broader problems in the rulemaking and that Congress is best suited to remedy these problems. Most strikingly, Peters argued that the proponent of the latter exemption<sup>266</sup> could have killed its chances had he provided enough proof to justify a broader exemption:

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<sup>263</sup> *Id.* at 64,564.

<sup>264</sup> *Id.* at 64,565.

<sup>265</sup> 2003 Recommendations, *supra* note 200, at 63.

<sup>266</sup> Kahle et al., 2003 Comment, *supra* note 174.

In principle, these considerations apply to a wide variety of works, but proponents of an exemption have provided sufficient facts to justify only the narrower class recommended herein. Moreover, to the extent that this factor warrants exempting all works (or all works in digital formats) from the prohibition of § 1201(a)(1) in order to enable preservation activities, it actually would warrant rejection of the exemption . . . . Paradoxically, the failure of the proponents of this exemption to justify the need to circumvent access controls for all the types of works they proposed to be exempted may have salvaged what otherwise would have been an overly broad proposal . . . .<sup>267</sup>

To the extent that they exist, the problems of access and archiving caused by the failures of TPMs or the evolution of technology reached across several section 102(a) categories of works. As with dual-purpose TPMs, the Register acknowledged that there are substantial problems with the legislation that reach across multiple categories of 102(a) works and expressed some sympathy for those adversely affected by the basic ban. Yet she explicitly interpreted her powers as narrowly constructed and thus eliminated her own ability to ameliorate the law's disadvantages.

##### 5. In Support of Exemptions: Some Trends

Thus far, we have highlighted how the Register's reasoning generally proceeded from the same sorts of reasoning proffered by anti-exemption witnesses; her most common claims took the form of procedural and jurisdictional arguments. Likewise, her support of exemptions generally reproduced some of the most common arguments of proponents, and it likewise focused on policy outcomes. Nonetheless, this divide was not as sharp as between proponents and opponents. In opposing exemptions, Peters was more likely to engage in the debate over policy goals and outcomes. She frequently invoked the statute's stated goal to preserve the economic incentives of copyright, and she worked to rebut proponents' claims of harm by referring them to non-circumventing solutions to their fair use problems. While she was fairly likely to reject classes of works as improperly defined, she was actually more likely to use policy outcomes to reject proposals. Likewise, in supporting exemptions, Peters was more likely than proponents to make procedural claims and class-of-works arguments. Yet, as do proponents generally, Peters placed policy

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<sup>267</sup> 2003 Recommendations, *supra* note 200, at 61.

goals and outcomes most prominently in her support for exemptions.

The Register's most commonly used pro-exemption argument was that the statute intends to preserve fair use; this appeared in thirteen of ninety-nine sections. In all three documents, she made this claim in her introductory explanation of the purpose of the rulemaking. For instance, she quoted from the Commerce report where it stated, "[t]he primary goal of the rulemaking proceeding is to assess whether the prevalence of these technological protections, with respect to particular categories of copyrighted materials, is diminishing the ability of individuals to use these works in ways that are otherwise lawful."<sup>268</sup> This discussion of the intent of § 1201 to preserve fair use was primarily presented in preliminary sections of the documents; she only discussed it explicitly in two of the ten sections recommending exemptions.

In another policy argument, the Register's third most-common pro-exemption claim was that, without an exemption, § 1201 would erode the ability to make noninfringing uses. She made this claim in all ten sections recommending an exemption—and nowhere else. For instance, in the 2000 ruling, she recommended an exemption for "compilations consisting of lists of websites blocked by filtering software applications,"<sup>269</sup> particularly those that filtered allegedly offensive content. As part of this recommendation, she argued, "a persuasive case was made that the existence of access control measures has had an adverse effect on criticism and comment, and most likely news reporting, and that the prohibition on circumvention of access control measures will have an adverse effect."<sup>270</sup> While the two arguments were less closely coupled than in pro-exemption documents, the Register was here completing their most common syllogism: the statute intended to preserve fair use via the rulemaking, and without an exemption, fair use would be endangered, so an exemption was warranted. On this count, at least, when the Register supported exemptions, she sounded like a pro-exemption witness.

Other common arguments, however, differed sharply from the bulk of pro-exemption speakers. Her second most frequently used claim was that a proposed class of works was defined properly, and in an argument that is tied for third most-common, she argued that the pro-exemption side met its burden of proof. The former,

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<sup>268</sup> *Id.* at 9 (citing H.R. REP. NO. 105-551, pt. 2, at 37 (1998)).

<sup>269</sup> 2000 Ruling, *supra* note 198, at 64,564.

<sup>270</sup> *Id.*

appearing in eleven sections, further demonstrates the Register's tremendous attachment to the requirement for a properly defined class of works. Yet in most instances, she did not simply support the class of works as defined by proponents. In several cases, she carved out classes of works that are more narrowly tailored to the evidence that justified an exemption.<sup>271</sup>

The argument that the pro-exemption side met its burden of proof, found in ten sections, further illustrated her demand that proponents demonstrate substantial adverse effect; in all six approved exemptions she explicitly stated that they had done so. In the case of the circumvention to gain access to lists of websites blocked by content-filtering software, she even commended the exemption's proponent, Seth Finkelstein, as providing an example to teach future proponents how to meet the burden of proof:

The case made by Mr. Finkelstein for this exemption is also instructive for the manner in which it met the requisite showing. The evidence produced did not prove that a substantial number of people have utilized or were likely to utilize an exemption. [I]t was the qualitative need for an exemption that was controlling in this case; absent the ability of a few to carry out their noninfringing efforts notwithstanding the prohibition set forth in section 1201, the many would not reap the . . . information, analysis, criticism and comment enabled by the quantitatively small number of acts of circumvention.<sup>272</sup>

When rejecting or accepting proposals, Peters insisted that the burden of proving substantial adverse effects was most often one of the determining factors. Unlike proponents, Peters spent a lot of her pro-exemption energies in instruction to the uninformed, detailing the proper outlines of a proposed class of works and demonstrating the procedural claim that proponents had met their burden of proof.

#### 6. An Example of Support: The eBook Exemption

While these pro-exemption arguments were relatively straightforward, we believe Peters' 2003 reasoning in support of the ebook exemption illustrates them in action in a way that

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<sup>271</sup> *E.g.*, 2003 Recommendations, *supra* note 200, at 34-35 (criticizing many proponents for supporting a "renewal" of the 2000 exemption for "literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage, or obsolescence" without providing "any factual support for such an exemption . . . . However, a few commenters and persons testifying at the hearings did provide some factual support, although such evidence focused on a narrower class of works.").

<sup>272</sup> *Id.* at 26-27.

further illuminates Peters' very human role in the hearings. In stark contrast to her rejection of the DVD ancillary materials proposal, Peters here acknowledged that the added difficulties of making noninfringing uses without circumventing TPMs were substantial adverse impacts. She supported an exemption for the following class of works:

Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling of the ebook's read-aloud function and that prevent the enabling of screen readers to render the text into a "specialized format."<sup>273</sup>

In defining "specialized format," "digital text," and "authorized entities," the regulatory text referred to the 1997 Chafee Amendment, a statutory exemption that allowed organizations devoted to serving the needs of the visually impaired to reproduce entire works in audio or Braille form.<sup>274</sup> While this exemption was available to all noninfringing uses of works in the exempted class, it was explicitly targeted at aiding those who aid the visually impaired, thereby making more works available in specialized format.

Peters argued that TPMs prevent the ability to make such noninfringing uses—that, without an exemption, the right to make noninfringing uses would be eroded. In this case, the visually impaired and those who made copyrighted works available to them had less access to written materials. Even though it was a use-restricting feature that was the problem, these features were generally protected by access-controlling TPMs, and the circumvention required to work around these obstacles would otherwise have violated the basic ban.<sup>275</sup> The obstacle was arbitrary; publishers could turn text-to-speech functionality on or off when wrapping ebooks in such dual-purpose TPMs. The Register also insisted that § 1201 was not intended to protect their decision to actively turn off disability-ameliorating features of their

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<sup>273</sup> *Id.* at 64.

<sup>274</sup> 17 U.S.C. § 121 (2004). On this point, Hartzog, *supra* note 19, underestimates the value of the exemption. He argues, "in order to take advantage of this exemption, the visually impaired user will have to figure out a way to circumvent the access control device prohibiting enablement of the read-aloud function." *Id.* at 337. As Peters concludes, if circumventions are conducted by authorized agencies, "such conduct clearly would be within the spirit of § 121 and most likely would, in such circumstances, appear to constitute a fair use of the work." 2003 Recommendations, *supra* note 200, at 70. In this case, at least, the Register seems determined to grant an exemption where it is obviously valuable.

<sup>275</sup> 2003 Recommendations, *supra* note 200, at 69-70.



products. There was “no reason to believe that Congress intended to give its blessing to such conduct.”<sup>276</sup> As a definitional matter, the Register commended the proposal by the library associations for defining a class of works that “commences with a section 102 category but, drawing on the guidance offered in the previous rulemaking, narrows it by reference to attributes of the technological measures that control access to the works.”<sup>277</sup> Thus, in detailed but straightforward prose, the Register declared that there were noninfringing uses at stake, that the bill was not intended to prohibit uses such as these, and that proponents had offered a properly defined class of works. If the harm to noninfringing users was greater than the harm to the market value of copyrighted works, then, she had set up a fine case for proposing an exemption.

The most revealing aspect of this section was Peters’ summary of the debate considering whether the harm to noninfringing users was substantial enough to meet their burden of proof. Publishers insisted that the harm was not due to the inability to access these materials;<sup>278</sup> the ebooks under consideration had been printed in hardcopy and were therefore accessible to those who would make noninfringing uses, e.g. creating audio books for the visually impaired. The Register acknowledged that alternative means were available, but she found this argument unpersuasive:

It has been argued by opponents of the exemption that entities such as Bookshare.org can make text versions of all books accessible to the blind and visually impaired since anyone can scan a book and submit it to Bookshare.org. However, the fact that *any* book *might* conceivably be made available does not mean that *all* books *are* or *will be* made available through such organizations. Resources are limited . . . .<sup>279</sup>

In other words, when a socially valuable noninfringing use is at stake, the Register can exempt certain classes of works merely because it makes such uses easier or cheaper. This was true even when the alternative medium of access (in this case, print) was the dominant medium and the TPM-laden digital medium was in its infancy. In other words, the Register established the precedent that the mere existence of alternative means of access does not

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<sup>276</sup> *Id.* at 71.

<sup>277</sup> *Id.* at 72 (omitted citation is to 2000 Ruling, *supra* note 198, at 64,561).

<sup>278</sup> Allan Adler, Vice President for Legal & Gov’t Affairs, Association of American Publishers, 2003 Reply Comment, 13 (Feb. 20, 2003), <http://www.copyright.gov/1201/2003/reply/026.pdf>.

<sup>279</sup> 2003 Recommendations, *supra* note 200, at 77.

preclude the finding that the basic ban is harming otherwise noninfringing users in a way that justifies an exemption.

From the perspective of those who supported exemptions, the Register did offer one problematic claim in her support for this exemption. She argued, “a broad exemption on ebooks generally could create significant harm to this emerging market by facilitating Napster-like distribution of ebooks over the Internet,”<sup>280</sup> and she insisted that this was only prevented by the extremely narrow parameters of the current exemption. Yet her reasoning on this point was as problematic as was that discussed above in relation to the proposed exemption for ancillary materials on DVD. In short, Peters failed to demonstrate that widespread infringement would *uniquely* result from an exemption. The statute plainly stated that exemptions applied only to persons who were making noninfringing uses,<sup>281</sup> so copyright holders could pursue illicit ebook distributors for § 1201 violations regardless of the framing of the exemption. The exemption also provided no sanctuary for those who would violate the trafficking bans. Here as in the ancillary materials rejection, Peters alleged but failed to demonstrate that widespread circumvention would uniquely result from a broad exemption.

Note that Peters’ support for this exemption employed a standard for establishing harm to noninfringing users that was substantially lower than the standard she used in rejecting the ancillary DVD materials proposal. In rejecting the proposal by Ernest Miller to exempt ancillary works on DVDs, Peters simply ignored Miller’s claim that the extra trouble and expense of acquiring additional equipment constituted an unacceptable tax on noninfringing users. In supporting the ebooks exemption, however, she herself used exactly this reasoning in rebutting the publishers’ argument that there were alternative—in this case, utterly accessible—means of making a noninfringing use. This was a demonstrable inconsistency in her threshold for determining when proponents had demonstrated substantial adverse effects, because in both cases, “mere” inconvenience and added expense

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<sup>280</sup> *Id.* at 82.

<sup>281</sup> 17 U.S.C. § 1201(a)(1)(B) (2004):

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

*Accord* Miller, *supra* note 191, at 19.

were at stake. We suspect that Peters could not help but have weighed these cases differently based in part on which noninfringing users (online movie critics versus nonprofits devoted to helping the blind) would benefit from the two proposed exemptions. Considering her adamant insistence that classes of works be defined without any reference to intended uses or types of users, this outcome is more than a little ironic. We could also point to at least one other difference that also could have had an unacknowledged effect on Peters' reasoning: DVDs are *far* more important to the far more lucrative movie business than are ebooks to the publishing industry.

#### V. ON PARTING (WITH FAIR USE)

David Nimmer argues that § 1201 “seems to be a conscious contraction of user rights.”<sup>282</sup> Our analysis of the legislative process that led to the law and the process for determining exemptions to the basic ban buttresses this critique. In the first two rulemakings, those who oppose exemptions triumphantly leveraged the rules of the hearings to their advantage. Their regular insistence that a given proposed exemption was too broad and was therefore a matter to be taken up by Congress—and *not* the courts—was a clear allusion to the shift of venue; Congress had explicitly washed its hands by creating the hearings. Opponents' mantra that proponents faced a high burden of proof and a difficult task in defining a “class of works” indicates that they perceived this venue as friendly. The arguments of exemption proponents, conversely, reveal flagging efforts to find a foothold in a hostile venue. Proponents rarely discussed the rules of the hearings, and those who did were more likely to rail against the interpretations of the statute or the statute itself than they were to trumpet the rules. The final rulings and recommendations bore a much closer resemblance to the rhetoric of opponents than to that of proponents; this was most significant on important points such as the strict requirements for a narrowly defined “class of works” and the presumption against exemptions. At times, the Register of Copyrights even implied that her hands were tied when it came to helping proponents. This study therefore reveals a pattern in which proponents, opponents, and adjudicators all implicitly agreed that the new venue places a heavy thumb on one side of the scales.

The DVD Content Scrambling System was the single most

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<sup>282</sup> Nimmer, *supra* note 6, at 739.

controversial TPM scheme considered in the rulemaking; despite hundreds of calls for an exemption and documented harms to fair use, it remains unscathed by the final rulings. Regardless of the statute's insistence on the continued availability of defenses such as fair use, it remains illegal to circumvent the access controls on a legally purchased DVD, even for purposes such as playing it on one's home machine or using fifteen seconds of footage for scholarly commentary. Even if the Librarian of Congress were to rule that circumventing CSS to access DVDs for otherwise noninfringing purposes is legal, this would help only the few who have the technical skill to make such a circumvention themselves; the Librarian has no power to permit the development and circulation of circumvention tools.

This is a significant shift of venue, taking the responsibility for ensuring fair use away from the courts and giving it to an obscure, relatively toothless rulemaking process. For decades, federal courts have predictably sided with those who have made noninfringing uses and substantially noninfringing technologies. Now, those legal principles are generally unavailable to defendants who are accused of violating § 1201. This leaves wider fair use concerns without a venue. Congress has insisted that the hearings are the proper venue, while the Librarian insists that these concerns should be taken to Congress. The courts now serve only to determine whether a defendant has circumvented a TPM or trafficked in the tools to do so, regardless of her intentions. This is a Catch-22; no matter where a would-be noninfringing user goes, she is told to take her concerns elsewhere because the venue at hand is not in charge of these particular concerns. In varying degrees, each of these venues has even acknowledged the potential flaws of § 1201, but the overseers of each venue protest that they are helpless to restore the proper balance among competing rights.

For those who would circumvent a TPM en route to committing an infringement of copyright law, the additional dissuasive power of the basic ban is virtually nonexistent. Yet this elephant stood boldly in the rulemaking's living room. Surely the Register and almost everybody else involved had noticed its presence. Yet the charade proceeded, and Peters continued to pretend that a carefully phrased exemption can provide meaningful relief for would-be fair users. Not many have really been fooled, and fewer participants continue to play along.<sup>283</sup>

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<sup>283</sup> In 2003, there were 51 comments, 338 reply comments, and 44 unique live witnesses.

This is not to say that the Register of Copyrights Marybeth Peters is coldhearted or unconcerned. While copyright holders objected vociferously to each, Peters did see fit to recommend six exemptions. Thanks to the Register, we know more about the software that filters content for our children, and we are better able to access materials that remain locked due to broken dongles. Assuming that the two completely new exemptions from 2003 have been used, our society can better archive materials that are in obsolete formats, and visually impaired readers have access to more books.

Despite her commendable support for narrow exemptions, however, the Register's reasoning has been deeply flawed on several points. The differences between the House Manager's Report and the Commerce Committee Report are meaningful, and the latter is by far the more legitimate source for divining legislative intent. More realistically, there is no primary intent behind § 1201, but rather a clash of hopes and wishes that tumbled out in the form of an awkwardly worded statute.

Peters should admit that she has created the rules from congressional scraps. She should consider the demonstration of some adverse impact on even one noninfringing user as creating the exigency for granting an exemption, subject to the other four statutory factors. She should take the statutory reference to users and uses, as well as the tradition of use-based fair use jurisprudence, as an imperative to craft exemptions that are less narrowly tied to the traits of works and are more targeted at the socially valued uses that she identifies as newly endangered; this may be accomplished by granting multiple exemptions across multiple classes of works. Perhaps most importantly, she should spend less time piecing together bureaucratic obstacles to meaningful relief and spend more time exploring the possibilities of the rulemaking. Unfortunately, if her preemptively defensive 2005 Notice of Inquiry<sup>284</sup> is any indicator, the 2006 exemptions will

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*See* 2003 Rulemaking, *supra* note 159. In the ongoing 2006 rulemaking, despite an increase to 74 comments, there are only 35 reply comments, and (based on the preliminary schedule) only 16 unique live witnesses testified. This article's first author submitted a reply comment and testified on behalf of two proposed exemptions. See U.S. Copyright Office, Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works (2006), <http://www.copyright.gov/1201/>.

<sup>284</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Notice of Inquiry, 70 Fed. Reg. 57,526 (Oct. 3, 2005) (to be codified at 37 C.F.R. pt. 201), *available at* <http://www.copyright.gov/fedreg/2005/70fr57526.html>.

do little more—and perhaps even less—than the current set to alleviate the erosion of fair use.

More usefully, we think that Congress should scrap the whole artifice as soon as possible. In each of the last three Congresses, Rick Boucher has sponsored legislation that would, among other things, exempt those engaged in otherwise noninfringing uses from the basic ban.<sup>285</sup> We are not surprised that Congress has mostly ignored this needed reform. It is because of them that, in the digital millennium, fair use is locked in a Catch 1201.

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<sup>285</sup> H.R. 5544, 107th Cong. (2002); H.R. 107, 108th Cong. (2003); H.R. 1201, 109th Cong. (2005).