

- 2.) Are you convinced that code is speech? If so, do you agree with the court's analysis of the First Amendment claim? If not, why not?
- 3.) Do you agree with the Court's analysis of whether the DMCA unconstitutionally abridges fair use? If you were Corley's attorney, how would you have presented the argument?
- 4.) How does the court reconcile its interpretation of 1201(a) with 1201(c)'s statement that "[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title"?
- 5.) The court did not reach the Constitutional argument that § 1201 violates the IP clause's requirement that rights must be for "limited times." Why? If I add my copyrighted introduction to Shakespeare's sonnets and then encrypt the full eBook, so that circumventing in order to excerpt the public domain sonnets would run afoul of 1201(a); does this scenario raise constitutional concerns about "perpetual" copyright, or just involve matters of convenience and preferred format (anyone who wants the public domain sonnets should just buy another physical copy of them)? What if we reach the point when no one uses physical books anymore?

2.) Anti-Circumvention, Competition, and Consumer Choice

Chamberlain v. Skylink
381 F.3d 1178 (Fed. Cir. 2004)



GAJARSA, Circuit Judge.

Background

Chamberlain sued Skylink, alleging violations of the patent and copyright laws. . . . The matter on appeal involves only Chamberlain's allegation that Skylink is violating the DMCA, specifically the anti-trafficking provision of § 1201(a)(2). . . .

The technology at issue involves Garage Door Openers (GDOs). A GDO typically consists of a hand-held portable transmitter and a garage door opening device mounted in a homeowner's garage. The opening device, in turn, includes both a receiver with associated signal processing software and a motor to open or close the garage door. In order to open or close the garage door, a user must activate the transmitter, which sends a radio frequency (RF) signal to the receiver located on the opening device. Once the opener receives a recognized signal, the signal processing software directs the motor to open or close the garage door.

When a homeowner purchases a GDO system, the manufacturer provides both an opener and a transmitter. Homeowners who desire replacement or spare transmitters can purchase them in the aftermarket. Aftermarket consumers have long been able to purchase “universal transmitters” that they can program to interoperate with their GDO system regardless of make or model. Skylink and Chamberlain are the only significant distributors of universal GDO transmitters. . . .



Skylink's Model 39 universal transmitter

This dispute involves Chamberlain's Security+ line of GDOs and Skylink's Model 39 universal transmitter. Chamberlain's Security+ GDOs incorporate a copyrighted “rolling code” computer program that constantly changes the transmitter signal needed to open the garage door. Skylink's Model 39 transmitter, which does not incorporate rolling code, nevertheless allows users to operate Security+ openers. Chamberlain alleges that Skylink's transmitter renders the Security+ insecure by allowing unauthorized users to circumvent the security inherent in rolling codes. Of greater legal significance, however, Chamberlain contends that because of this property of the Model 39, Skylink is in violation of the anti-trafficking clause of the DMCA's anti-circumvention provisions, specifically § 1201(a)(2). . . .

Access and Protection

Congress crafted the new anti-circumvention and anti-trafficking provisions here at issue to help bring copyright law into the information age. Advances in digital technology over the past few decades have stripped copyright owners of much of the technological and economic protection to which they had grown accustomed. Whereas large-scale copying and distribution of copyrighted material used to be difficult and expensive, it is now easy and inexpensive. The *Reimerdes* court [*Reimerdes* is the District Court decision in *Corley*] correctly noted both the economic impact of these advances and their consequent potential impact on innovation. Congress therefore crafted legislation restricting some, but not all, technological measures designed either to access a work protected by copyright, § 1201(a), or to infringe a right of a copyright owner, § 1201(b).

Though as noted, circumvention *is not* a new form of infringement but rather a new violation prohibiting actions or products that facilitate infringement, it is significant that virtually every clause of § 1201 that mentions “access” links “access” to “protection.” The import of that linkage may be less than obvious. Perhaps the best way to appreciate the necessity of this linkage—and the disposition of this case—is to consider three interrelated questions inherent in the DMCA's structure: What does § 1201(a)(2) prohibit above and beyond the prohibitions of § 1201(b)? What is the relationship between the sorts of “access” prohibited under § 1201(a) and the rights “protected” under the Copyright Act? and What is the relationship between anti-circumvention liability under § 1201(a)(1) and anti-trafficking liability under § 1201(a)(2)? The relationships among the new liabilities that these three provisions, §§ 1201(a)(1), (a)(2), (b), create circumscribe the DMCA's scope—and therefore allow us to determine whether or not Chamberlain's claim falls within its purview. And the key to disentangling these relationships lies in understanding the linkage between access and protection.

Chamberlain urges us to read the DMCA as if Congress simply created a new protection for copyrighted works without any reference at all either to the protections that copyright owners already possess or to the rights that the Copyright Act grants to the public. Chamberlain has not alleged that Skylink's Model 39 infringes its copyrights, nor has it alleged that the Model 39 contributes to third-party infringement of its copyrights. Chamberlain's allegation is considerably more straightforward: The only way for the Model 39 to interoperate with a Security+ GDO is by "accessing" copyrighted software. Skylink has therefore committed a *per se* violation of the DMCA. Chamberlain urges us to conclude that no necessary connection exists between access and *copyrights*. Congress could not have intended such a broad reading of the DMCA.

Chamberlain derives its strongest claimed support for its proposed construction from the trial court's opinion in *Reimerdes*, a case involving the same statutory provision. Though Chamberlain is correct in considering some of the *Reimerdes* language supportive, it is the differences between the cases, rather than their similarities, that is most instructive in demonstrating precisely what the DMCA permits and what it prohibits.

The facts here differ greatly from those in *Reimerdes*. There, a group of movie studios sought an injunction under the DMCA to prohibit illegal copying of DVDs. The plaintiffs presented evidence that each motion picture DVD includes a content scrambling system (CSS) that permits the film to be played, but not copied, using DVD players that incorporate the plaintiffs' licensed decryption technology. The defendant provided a link on his website that allowed an individual to download DeCSS, a program that allows the user to circumvent the CSS protective system and to view *or to copy* a motion picture from a DVD, whether or not the user has a DVD player with the licensed technology. The defendant proudly trumpeted his actions as "electronic civil disobedience." The court found that the defendant had violated § 1201(a)(2)(A) because DeCSS had only one purpose: to decrypt CSS.

Chamberlain's proposed construction of the DMCA ignores the significant differences between defendants whose accused products enable copying and those, like Skylink, whose accused products enable only legitimate uses of copyrighted software . . . Many of Chamberlain's assertions in its brief to this court conflate the property right of copyright with the liability that the anti-circumvention provisions impose.

Chamberlain relies upon the DMCA's prohibition of "fair uses . . . as well as foul," *Reimerdes*, to argue that the enactment of the DMCA eliminated all existing consumer expectations about the public's rights to use purchased products because those products might include technological measures controlling access to a copyrighted work. But Chamberlain appears to have overlooked the obvious. The possibility that § 1201 might prohibit some otherwise noninfringing public uses of copyrighted material, arises simply because the Congressional decision to create liability and consequent damages for making, using, or selling a "key" that essentially enables a *trespass* upon intellectual property need not be identical in scope to the liabilities and compensable damages for *infringing* that property; it is, instead, a rebalancing of interests that "attempt[s] to deal with special problems created by the so-called digital revolution."

Though *Reimerdes* is not the only case that Chamberlain cites for support, none of its other citations are any more helpful to its cause. In three other cases, *Lexmark International, Inc. v. Static Control Components, Inc.* (E.D. Ky. 2003), *Sony Computer Entertainment America, Inc. v. Gamemasters* (N.D. Cal. 1999), and *RealNetworks* (2000), the trial courts did grant preliminary injunctions under the DMCA using language supportive of Chamberlain's proposed construction. None of these cases, however, is on point. In *Lexmark*, the trial

court ruled that the defendant's conduct constituted copyright infringement. In *Sony*, the plaintiff's allegations included both trademark and copyright infringement, and the defendant conceded that its product made "temporary modifications" to the plaintiff's copyrighted computer program. In *RealNetworks*, the defendant's product allegedly disabled RealNetworks' "copy switch," RealNetworks' technological measure designed to let the owner of copyrighted material being streamed over RealNetworks' media player either enable or disable copying upon streaming. The court stated explicitly that the avoidance of the copy switch appeared to have little commercial value other than circumvention and the consequent infringement that it enabled. In short, the access alleged in all three cases was intertwined with a protected right. None of these cases can support a construction as broad as the one that Chamberlain urges us to adopt, even as persuasive authority.

Furthermore, though the severance of access from protection appears plausible taken out of context, it would also introduce a number of irreconcilable problems in statutory construction. The seeming plausibility arises because the statute's structure could be seen to suggest that § 1201(b) strengthens a copyright owner's abilities to protect its recognized *rights*, while § 1201(a) strengthens a copyright owner's abilities to protect *access* to its work without regard to the legitimacy (or illegitimacy) of the actions that the accused access enables. Such an interpretation is consistent with the Second Circuit's description: "[T]he focus of subsection 1201(a)(2) is circumvention of technologies designed to *prevent access* to a work, and the focus of subsection 1201(b)(1) is circumvention of technologies designed to *permit access* to a work but *prevent copying* of the work or some other act that infringes a copyright." *Corley*.

It is unlikely, however, that the Second Circuit meant to imply anything as drastic as wresting the concept of "access" from its context within the Copyright Act, as Chamberlain would now have us do. Were § 1201(a) to allow copyright owners to use technological measures to block *all* access to their copyrighted works, it would effectively create two distinct copyright regimes. In the first regime, the owners of a typical work protected by copyright would possess only the rights enumerated in 17 U.S.C. § 106, subject to the additions, exceptions, and limitations outlined throughout the rest of the Copyright Act—notably but not solely the fair use provisions of § 107.¹⁴ Owners who feel that technology has put those rights at risk, and who incorporate technological measures to protect those rights from technological encroachment, gain the additional ability to hold traffickers in circumvention devices liable under § 1201(b) for putting their rights back at risk by enabling circumventors who use these devices to infringe.

Under the second regime that Chamberlain's proposed construction implies, the owners of a work protected by *both* copyright *and* a technological measure that effectively controls access to that work per § 1201(a) would possess *unlimited* rights to hold circumventors liable under § 1201(a) *merely for accessing that work*, even if that access enabled *only* rights that the Copyright Act grants to the public. This second implied regime would be problematic for a number of reasons. First, as the Supreme Court recently explained, "Congress' exercise of its Copyright Clause authority must be rational." *Eldred v. Ashcroft* (2003). In determining whether a particular aspect of the

¹⁴ We do not reach the relationship between § 107 fair use and violations of § 1201. The District Court in *Reimerdes* rejected the DeCSS defendants' argument that fair use was a *necessary* defense to § 1201(a); because any access enables some fair uses, *any* act of circumvention would embody its own defense. We leave open the question as to when § 107 might serve as an affirmative defense to a *prima facie* violation of § 1201. For the moment, we note only that though the traditional fair use doctrine of § 107 remains unchanged as a defense to copyright infringement under § 1201(c)(1), circumvention is not infringement.

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

That apparent irrationality, however, is not the most significant problem that this second regime implies. Such a regime would be hard to reconcile with the DMCA’s statutory prescription that “[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.” 17 U.S.C. § 1201(c)(1). A provision that prohibited access without regard to the rest of the Copyright Act would clearly affect rights and limitations, if not remedies and defenses. Justice Souter has remarked that “[n]o canon of statutory construction familiar to me specifically addresses the situation in which two simultaneously enacted provisions of the same statute flatly contradict one another. We are, of course, bound to avoid such a dilemma if we can, by glimpsing some uncontradicted meaning for each provision.” Chamberlain’s proposed construction of § 1201(a) would flatly contradict § 1201(c)(1)—a simultaneously enacted provision of the same statute. We are therefore bound, if we can, to obtain an alternative construction that leads to no such contradiction.

Chamberlain’s proposed severance of “access” from “protection” in § 1201(a) creates numerous other problems. Beyond suggesting that Congress enacted *by implication* a new, highly protective alternative regime for copyrighted works; contradicting other provisions of the same statute including § 1201(c)(1); and ignoring the explicit immunization of interoperability from anti-circumvention liability under § 1201(f); the broad policy implications of considering “access” in a vacuum devoid of “protection” are both absurd and disastrous. Under Chamberlain’s proposed construction, explicated at oral argument, disabling a burglar alarm to gain “access” to a home containing copyrighted books, music, art, and periodicals would violate the DMCA; anyone who did so would unquestionably have “circumvent[ed] a technological measure that effectively controls access to a work protected under [the Copyright Act].” § 1201(a)(1). The appropriate deterrents to this type of behavior lie in tort law and criminal law, *not* in copyright law. Yet, were we to read the statute’s “plain language” as Chamberlain urges, disabling a burglar alarm would be a *per se* violation of the DMCA.

In a similar vein, Chamberlain’s proposed construction would allow any manufacturer of any product to add a single copyrighted sentence or software fragment to its product, wrap the copyrighted material in a trivial “encryption” scheme, and thereby gain the right to restrict consumers’ rights to use its products in conjunction with competing products. In other words, Chamberlain’s construction of the DMCA would allow virtually any company to attempt to leverage its sales into aftermarket monopolies—a practice that both the antitrust laws, and the doctrine of copyright misuse, normally prohibit.

Even were we to assume *arguendo* that the DMCA’s anti-circumvention provisions created a new property right, Chamberlain’s attempt to infer such an exemption from copyright misuse and antitrust liability would *still* be wrong. We have noted numerous times that as a matter of Federal Circuit law, “[i]ntellectual property rights do not confer a privilege to violate the antitrust laws. But it is also correct that the antitrust laws do not negate [a] patentee’s right to exclude others from patent property.” *CSU, L.L.C. v. Xerox Corp.* (Fed. Cir. 2000). In what we previously termed “the most extensive analysis of the

effect of a unilateral refusal to license copyrighted expression,” among our sister Circuits, the First Circuit explained that: “[T]he Copyright Act does not explicitly purport to limit the scope of the Sherman Act. . . . [W]e must harmonize the two [Acts] as best we can.” *Data Gen. Corp. v. Grumman Sys. Support Corp.* (1st Cir. 1994).

Because nothing in Seventh Circuit law contradicts *Data General*, we similarly conclude that it is the standard that the Seventh Circuit would most likely follow. The DMCA, as part of the Copyright Act, does not limit the scope of the antitrust laws, either explicitly or implicitly. The Supreme Court

has considered the issue of implied repeal of the antitrust laws in the context of a variety of regulatory schemes and procedures. Certain axioms of construction are now clearly established. Repeal of the antitrust laws by implication is not favored and not casually to be allowed. Only where there is a plain repugnancy between the antitrust and regulatory provisions will repeal be implied.

Gordon v. N.Y. Stock Exch., Inc. (1975). . . .

Finally, the requisite “authorization,” on which the District Court granted Skylink summary judgment, points to yet another inconsistency in Chamberlain’s proposed construction. . . . Underlying Chamberlain’s argument on appeal that it has not granted such authorization lies the necessary assumption that Chamberlain is entitled to prohibit legitimate purchasers of its embedded software from “accessing” the software by using it. Such an entitlement, however, would go far beyond the idea that the DMCA allows copyright owner to prohibit “fair uses . . . as well as foul.” Chamberlain’s proposed construction would allow copyright owners to prohibit *exclusively fair* uses even in the absence of any feared foul use. It would therefore allow any copyright owner, through a combination of contractual terms and technological measures, to repeal the fair use doctrine with respect to an individual copyrighted work—or even selected copies of that copyrighted work. Again, this implication contradicts § 1201(c)(1) directly. Copyright law itself authorizes the public to make certain uses of copyrighted materials. Consumers who purchase a product containing a copy of embedded software have the inherent legal right to use that copy of the software. What the law authorizes, Chamberlain cannot revoke.¹⁷

Chamberlain’s proposed severance of “access” from “protection” is entirely inconsistent with the context defined by the total statutory structure of the Copyright Act, other simultaneously enacted provisions of the DMCA, and clear Congressional intent. It “would lead to a result so bizarre that Congress could not have intended it.” The statutory structure and the legislative history both make it clear that the DMCA granted copyright holders additional legal protections, but neither rescinded the basic bargain granting the public noninfringing and fair uses of copyrighted materials, § 1201(c), nor prohibited various beneficial uses of circumvention technology, such as those exempted under §§ 1201(d),(f),(g),(j).

We therefore reject Chamberlain’s proposed construction in its entirety. We conclude that 17 U.S.C. § 1201 prohibits only forms of access that bear a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners. While such a rule of reason may create some uncertainty and consume some judicial resources, it is the only meaningful reading of the statute. Congress attempted to balance the legitimate

¹⁷ It is not clear whether a consumer who circumvents a technological measure controlling access to a copyrighted work in a manner that enables uses permitted under the Copyright Act but prohibited by contract can be subject to liability under the DMCA. Because Chamberlain did not attempt to limit its customers’ use of its product by contract, however, we do not reach this issue.

interests of copyright owners with those of consumers of copyrighted products. . . .

Congress chose words consistent with its stated intent to balance two sets of concerns pushing in opposite directions. The statute lays out broad categories of liability and broad exemptions from liability. It also instructs the courts explicitly *not* to construe the anti-circumvention provisions in ways that would effectively repeal longstanding principles of copyright law. *See* § 1201(c). The courts must decide where the balance between the rights of copyright owners and those of the broad public tilts subject to a fact-specific rule of reason. Here, Chamberlain can point to no protected property right that Skylink imperils. The DMCA cannot allow Chamberlain to retract the most fundamental right that the Copyright Act grants consumers: the right to use the copy of Chamberlain's embedded software that they purchased.

Chamberlain's DMCA Claim

The proper construction of § 1201(a)(2) therefore makes it clear that Chamberlain cannot prevail. A plaintiff alleging a violation of § 1201(a)(2) must prove: (1) ownership of a valid copyright on a work, (2) effectively controlled by a technological measure, which has been circumvented, (3) that third parties can now access (4) without authorization, in a manner that (5) infringes or facilitates infringing a right protected by the Copyright Act, because of a product that (6) the defendant either (i) designed or produced primarily for circumvention; (ii) made available despite only limited commercial significance other than circumvention; or (iii) marketed for use in circumvention of the controlling technological measure. A plaintiff incapable of establishing any one of elements (1) through (5) will have failed to prove a *prima facie* case. A plaintiff capable of proving elements (1) through (5) need prove only one of (6)(i), (ii), or (iii) to shift the burden back to the defendant. At that point, the various affirmative defenses enumerated throughout § 1201 become relevant. . . .

Questions:

- 1.) Is *Skylink* consistent with *Corley*? Why or why not?
- 2.) Do you agree with the *Skylink* court's "nexus" requirement? Explain its reasoning. Are there other grounds on which the court could have ruled for Skylink?
- 3.) If *Skylink*'s interpretation of § 1201 is correct, can you provide an example of a violation of § 1201(a)(2) that is not also a violation of § 1201(b)? What would the *Skylink* court say is the purpose of having *both* provisions?

PROBLEM 15-1

Look back at Problem 12-1. If you recall, a neighborhood bookstore had on display a mint-condition, unopened copy of Madonna's 1992 book *Sex*, which was sealed with a paper band. On the paper band was an announcement that breaking the band constituted a promise to buy, and that doing so without paying constituted copyright infringement. James broke the band, peeked inside the book, and left the store without buying it. Did James infringe copyright?

Now a few years have passed and James is raising teenage girls who are huge fans of Miley Cyrus and Lady Gaga. He has become increasingly disturbed by the provocative behavior of these recording artists and how it is influencing his daughters.

He concludes that overt sexuality in female recording stars can be traced back to a single source—Madonna’s book. He decides that the most effective way of de-twerking popular culture is to create a powerful parody of this book. James finds an eBook version of *Sex* on the internet, but it is encrypted, and he cannot get an access code without paying for it. He refuses to support such depravity financially. Instead, he uses Jennifer’s “FairXTract” program to decrypt the eBook and extract a small amount of text and imagery for his parody.

FairXTract is a popular open source program that can convert DRM encrypted text and image files into more open formats that can be freely read, copied or edited without restriction. The program is made available freely online and lists a number of possible uses: “Make backup copies of your e-library! Don’t be locked in to your obsolete e-reader! Annotate and comment on your favorite literature. Create excerpts for your English class. FairXTract is the key to FairXUse!” James’s parody, “(Im)material Girl,” portrays Madonna’s musings on sexuality as the cynical objectification of female sexuality in the service of profit. He posts it on his blog, “Family Values—A Return to Decency.” Assume that his parody would be considered a fair use under § 107.

Has James violated the DMCA? Has Jennifer? If so, what provisions have they violated? How would the *Corley* court hold? What about the *Skylink* court?

3.) The Interaction between Copyright, Contracts, and the DMCA

MDY Industries, LLC v. Blizzard Entertainment, Inc.

629 F.3d 928 (9th Cir. 2010)



CALLAHAN, Circuit Judge.

Blizzard Entertainment, Inc. (“Blizzard”) is the creator of World of Warcraft (“WoW”), a popular multiplayer online role-playing game in which players interact in a virtual world while advancing through the game’s 70 levels. MDY Industries, LLC and its sole member Michael Donnelly (“Donnelly”) (. . . “MDY”) developed and sold Glider, a software program that automatically plays the early levels of WoW for players.

MDY brought this action for a declaratory judgment to establish that its Glider sales do not infringe Blizzard’s copyright or other rights, and Blizzard asserted counterclaims under the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 1201 *et seq.*, and for tortious interference with contract under Arizona law. The district court found MDY and Donnelly liable for secondary copyright infringement, violations of DMCA §§ 1201(a)(2) and (b)(1), and tortious interference with contract. We reverse the district court except as to MDY’s liability for violation of DMCA § 1201(a)(2) and remand for trial on Blizzard’s claim for tortious interference with contract.

I.

A. World of Warcraft

In November 2004, Blizzard created WoW, a “massively multiplayer online role-playing game” in which players interact in a virtual world. WoW has ten million subscribers, of which two and a half million are in North America. The WoW software has two components: (1) the game client software that a player installs on the computer;

and (2) the game server software, which the player accesses on a subscription basis by connecting to WoW's online servers. WoW does not have single-player or offline modes.

WoW players roleplay different characters, such as humans, elves, and dwarves. A player's central objective is to advance the character through the game's 70 levels by participating in quests and engaging in battles with monsters. As a player advances, the character collects rewards such as in-game currency, weapons, and armor. WoW's virtual world has its own economy, in which characters use their virtual currency to buy and sell items directly from each other, through vendors, or using auction houses. Some players also utilize WoW's chat capabilities to interact with others.

B. Blizzard's use agreements

Each WoW player must read and accept Blizzard's End User License Agreement ("EULA") and Terms of Use ("ToU") on multiple occasions. The EULA pertains to the game client, so a player agrees to it both before installing the game client and upon first running it. The ToU pertains to the online service, so a player agrees to it both when creating an account and upon first connecting to the online service. Players who do not accept both the EULA and the ToU may return the game client for a refund.

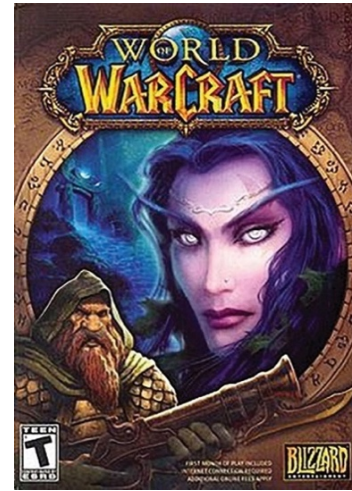


Image information available at https://en.wikipedia.org/wiki/World_of_Warcraft#/media/File:WoW_Box_Art1.jpg.

C. Development of Glider and Warden

Donnelly is a WoW player and software programmer. In March 2005, he developed Glider, a software "bot" (short for robot) that automates play of WoW's early levels, for his personal use. A user need not be at the computer while Glider is running. As explained in the Frequently Asked Questions ("FAQ") on MDY's website for Glider:

Glider . . . moves the mouse around and pushes keys on the keyboard. You tell it about your character, where you want to kill things, and when you want to kill. Then it kills for you, automatically. You can do something else, like eat dinner or go to a movie, and when you return, you'll have a lot more experience and loot.

Glider does not alter or copy WoW's game client software, does not allow a player to avoid paying monthly subscription dues to Blizzard, and has no commercial use independent of WoW. Glider was not initially designed to avoid detection by Blizzard.

The parties dispute Glider's impact on the WoW experience. Blizzard contends that Glider disrupts WoW's environment for non-Glider players by enabling Glider users to advance quickly and unfairly through the game and to amass additional game assets. MDY contends that Glider has a minimal effect on non-Glider players, enhances the WoW experience for Glider users, and facilitates disabled players' access to WoW by auto-playing the game for them.

In summer 2005, Donnelly began selling Glider through MDY's website for fifteen to twenty-five dollars per license. . . . In September 2005, Blizzard launched Warden, a technology that it developed to prevent its players who use unauthorized third-party software, including bots, from connecting to WoW's servers. Warden was able to detect Glider, and Blizzard immediately used Warden to ban most Glider users. MDY responded by modifying Glider to avoid detection and promoting its new anti-detection features on its website's FAQ. It added a subscription service, Glider Elite, which offered "additional

protection from game detection software” for five dollars a month.

Thus, by late 2005, MDY was aware that Blizzard was prohibiting bots. MDY modified its website to indicate that using Glider violated Blizzard’s ToU. In November 2005, Donnelly wrote in an email interview, “Avoiding detection is rather exciting, to be sure. Since Blizzard does not want bots running at all, it’s a violation to use them.” Following MDY’s anti-detection modifications, Warden only occasionally detected Glider. As of September 2008, MDY had gross revenues of \$3.5 million based on 120,000 Glider license sales.

D. Financial and practical impact of Glider

Blizzard claims that from December 2004 to March 2008, it received 465,000 complaints about WoW bots, several thousand of which named Glider. Blizzard spends \$940,000 annually to respond to these complaints, and the parties have stipulated that Glider is the principal bot used by WoW players. Blizzard introduced evidence that it may have lost monthly subscription fees from Glider users, who were able to reach WoW’s highest levels in fewer weeks than players playing manually. Donnelly acknowledged in a November 2005 email that MDY’s business strategy was to make Blizzard’s anti-bot detection attempts financially prohibitive. . . .

E. Pre-litigation contact between MDY and Blizzard

In October 2006, Blizzard’s counsel visited Donnelly’s home, threatening suit unless MDY immediately ceased selling Glider and remitted all profits to Blizzard. MDY immediately commenced this action.

II.

On December 1, 2006, MDY filed an amended complaint seeking a declaration that Glider does not infringe Blizzard’s copyright or other rights. In February 2007, Blizzard filed counterclaims and third-party claims against MDY and Donnelly for, *inter alia*, contributory and vicarious copyright infringement, violation of DMCA §§ 1201(a)(2) and (b)(1), and tortious interference with contract.

In July 2008, the district court granted Blizzard partial summary judgment, finding that MDY’s Glider sales contributorily and vicariously infringed Blizzard’s copyrights and tortiously interfered with Blizzard’s contracts. The district court also granted MDY partial summary judgment, finding that MDY did not violate DMCA § 1201(a)(2) with respect to accessing the game software’s source code.

In September 2008, the parties stipulated to entry of a \$6 million judgment against MDY for the copyright infringement and tortious interference with contract claims. They further stipulated that Donnelly would be personally liable for the same amount if found personally liable at trial. After a January 2009 bench trial, the district court held MDY liable under DMCA §§ 1201(a)(2) and (b)(1). It also held Donnelly personally liable for MDY’s copyright infringement, DMCA violations, and tortious interference with contract.

. . . The district court permanently enjoined MDY from distributing Glider. MDY’s efforts to stay injunctive relief pending appeal were unsuccessful. On April 29, 2009, MDY timely filed this appeal. On May 12, 2009, Blizzard timely cross-appealed the district court’s holding that MDY did not violate DMCA §§ 1201(a)(2) and (b)(1) as to the game software’s source code. . . .

IV.

We first consider whether MDY committed contributory or vicarious infringement (collectively, “secondary infringement”) of Blizzard’s copyright by selling Glider to WoW players. *See ProCD, Inc. v. Zeidenberg* (7th Cir. 1996) (“A copyright is a right against the

world. Contracts, by contrast, generally affect only their parties.”). To establish secondary infringement, Blizzard must first demonstrate direct infringement. To establish direct infringement, Blizzard must demonstrate copyright ownership and violation of one of its exclusive rights by Glider users. MDY is liable for contributory infringement if it has “intentionally induc[ed] or encourag[ed] direct infringement” by Glider users. *MGM Studios Inc. v. Grokster, Ltd.* (2005). MDY is liable for vicarious infringement if it (1) has the right and ability to control Glider users’ putatively infringing activity and (2) derives a direct financial benefit from their activity. If Glider users directly infringe, MDY does not dispute that it satisfies the other elements of contributory and vicarious infringement.

As a copyright owner, Blizzard possesses the exclusive right to reproduce its work. 17 U.S.C. § 106(1). The parties agree that when playing WoW, a player’s computer creates a copy of the game’s software in the computer’s random access memory (“RAM”), a form of temporary memory used by computers to run software programs. This copy potentially infringes unless the player (1) is a licensee whose use of the software is within the scope of the license or (2) owns the copy of the software. 17 U.S.C. § 117(a). As to the scope of the license, ToU § 4(B), “Limitations on Your Use of the Service,” provides:

You agree that you will not . . . (ii) create or use cheats, bots, “mods,” and/or hacks, or any other third-party software designed to modify the World of Warcraft experience; or (iii) use any third-party software that intercepts, “mines,” or otherwise collects information from or through the Program or Service.

By contrast, if the player owns the copy of the software, the “essential step” defense provides that the player does not infringe by making a copy of the computer program where the copy is created and used solely “as an essential step in the utilization of the computer program in conjunction with a machine.” 17 U.S.C. § 117(a)(1).

A. Essential step defense

We consider whether WoW players, including Glider users, are owners or licensees of their copies of WoW software. If WoW players own their copies, as MDY contends, then Glider users do not infringe by reproducing WoW software in RAM while playing, and MDY is not secondarily liable for copyright infringement.

In *Vernor v. Autodesk, Inc.*, we recently distinguished between “owners” and “licensees” of copies for purposes of the essential step defense. In *Vernor*, we held “that a software user is a licensee rather than an owner of a copy where the copyright owner (1) specifies that the user is granted a license; (2) significantly restricts the user’s ability to transfer the software; and (3) imposes notable use” restrictions.

Applying *Vernor*, we hold that WoW players are licensees of WoW’s game client software. Blizzard reserves title in the software and grants players a non-exclusive, limited license. Blizzard also imposes transfer restrictions if a player seeks to transfer the license: the player must (1) transfer all original packaging and documentation; (2) permanently delete all of the copies and installation of the game client; and (3) transfer only to a recipient who accepts the EULA. A player may not sell or give away the account.

Blizzard also imposes a variety of use restrictions. The game must be used only for non-commercial entertainment purposes and may not be used in cyber cafes and computer gaming centers without Blizzard’s permission. Players may not concurrently use unauthorized third-party programs. Also, Blizzard may alter the game client itself remotely without a player’s knowledge or permission, and may terminate the EULA and ToU if players violate their terms. Termination ends a player’s license to access and play WoW. Following termination, players must immediately destroy their copies of the game and

uninstall the game client from their computers, but need not return the software to Blizzard.

Since WoW players, including Glider users, do not own their copies of the software, Glider users may not claim the essential step defense. Thus, when their computers copy WoW software into RAM, the players may infringe unless their usage is within the scope of Blizzard's limited license.

B. Contractual covenants vs. license conditions

"A copyright owner who grants a nonexclusive, limited license ordinarily waives the right to sue licensees for copyright infringement, and it may sue only for breach of contract." However, if the licensee acts outside the scope of the license, the licensor may sue for copyright infringement. Enforcing a copyright license "raises issues that lie at the intersection of copyright and contract law."

We refer to contractual terms that limit a license's scope as "conditions," the breach of which constitute copyright infringement. We refer to all other license terms as "covenants," the breach of which is actionable only under contract law. We distinguish between conditions and covenants according to state contract law, to the extent consistent with federal copyright law and policy.

A Glider user commits copyright infringement by playing WoW while violating a ToU term that is a license condition. To establish copyright infringement, then, Blizzard must demonstrate that the violated term—ToU § 4(B)—is a condition rather than a covenant. Blizzard's EULAs and ToUs provide that they are to be interpreted according to Delaware law. Accordingly, we first construe them under Delaware law, and then evaluate whether that construction is consistent with federal copyright law and policy.

A covenant is a contractual promise, i.e., a manifestation of intention to act or refrain from acting in a particular way, such that the promisee is justified in understanding that the promisor has made a commitment. A condition precedent is an act or event that must occur before a duty to perform a promise arises. Conditions precedent are disfavored because they tend to work forfeitures. Wherever possible, equity construes ambiguous contract provisions as covenants rather than conditions. However, if the contract is unambiguous, the court construes it according to its terms.

Applying these principles, ToU § 4(B)(ii) and (iii)'s prohibitions against bots and unauthorized third-party software are covenants rather than copyright-enforceable conditions. Although ToU § 4 is titled, "Limitations on Your Use of the Service," nothing in that section conditions Blizzard's grant of a limited license on players' compliance with ToU § 4's restrictions. To the extent that the title introduces any ambiguity, under Delaware law, ToU § 4(B) is not a condition, but is a contractual covenant.

To recover for copyright infringement based on breach of a license agreement, (1) the copying must exceed the scope of the defendant's license and (2) the copyright owner's complaint must be grounded in an exclusive right of copyright (e.g., unlawful reproduction or distribution). Contractual rights, however, can be much broader:

[C]onsider a license in which the copyright owner grants a person the right to make one and only one copy of a book with the caveat that the licensee may not read the last ten pages. Obviously, a licensee who made a hundred copies of the book would be liable for copyright infringement because the copying would violate the Copyright Act's prohibition on reproduction and would exceed the scope of the license. Alternatively, if the licensee made a single copy of the book, but read the last ten pages, the only cause of action would be for breach of contract, because reading a book does not violate any right protected by copyright law.

Consistent with this approach, we have held that the potential for infringement exists only where the licensee's action (1) exceeds the license's scope (2) in a manner that implicates one of the licensor's exclusive statutory rights.

Here, ToU § 4 contains certain restrictions that are grounded in Blizzard's exclusive rights of copyright and other restrictions that are not. For instance, ToU § 4(D) forbids creation of derivative works based on WoW without Blizzard's consent. A player who violates this prohibition would exceed the scope of her license and violate one of Blizzard's exclusive rights under the Copyright Act. In contrast, ToU § 4(C)(ii) prohibits a player's disruption of another player's game experience. A player might violate this prohibition while playing the game by harassing another player with unsolicited instant messages. Although this conduct may violate the contractual covenants with Blizzard, it would not violate any of Blizzard's exclusive rights of copyright. The antibot provisions at issue in this case, ToU § 4(B)(ii) and (iii), are similarly covenants rather than conditions. A Glider user violates the covenants with Blizzard, but does not thereby commit copyright infringement because Glider does not infringe any of Blizzard's exclusive rights. For instance, the use does not alter or copy WoW software.

Were we to hold otherwise, Blizzard—or any software copyright holder—could designate any disfavored conduct during software use as copyright infringement, by purporting to condition the license on the player's abstention from the disfavored conduct. The rationale would be that because the conduct occurs while the player's computer is copying the software code into RAM in order for it to run, the violation is copyright infringement. This would allow software copyright owners far greater rights than Congress has generally conferred on copyright owners.³

We conclude that for a licensee's violation of a contract to constitute copyright infringement, there must be a nexus between the condition and the licensor's exclusive rights of copyright.⁴ Here, WoW players do not commit copyright infringement by using Glider in violation of the ToU. MDY is thus not liable for secondary copyright infringement, which requires the existence of direct copyright infringement.

It follows that because MDY does not infringe Blizzard's copyrights, we need not resolve MDY's contention that Blizzard commits copyright misuse. Copyright misuse is an equitable defense to copyright infringement, the contours of which are still being defined. The remedy for copyright misuse is to deny the copyright holder the right to enforce its copyright during the period of misuse. Since MDY does not infringe, we do not consider whether Blizzard committed copyright misuse.

We thus reverse the district court's grant of summary judgment to Blizzard on its secondary copyright infringement claims. . . .

³ A copyright holder may wish to enforce violations of license agreements as copyright infringements for several reasons. First, breach of contract damages are generally limited to the value of the actual loss caused by the breach. In contrast, copyright damages include the copyright owner's actual damages and the infringer's actual profits, or statutory damages of up to \$150,000 per work. 17 U.S.C. § 504. Second, copyright law offers injunctive relief, seizure of infringing articles, and awards of costs and attorneys' fees. 17 U.S.C. §§ 502–03, 505. Third, . . . copyright law allows copyright owners a remedy against “downstream” infringers with whom they are not in privity of contract.

⁴ A licensee arguably may commit copyright infringement by continuing to use the licensed work while failing to make required payments, even though a failure to make payments otherwise lacks a nexus to the licensor's exclusive statutory rights. We view payment as *sui generis*, however, because of the distinct nexus between payment and all commercial copyright licenses, not just those concerning software.

V.

After MDY began selling Glider, Blizzard launched Warden, its technology designed to prevent players who used bots from connecting to the WoW servers. Blizzard used Warden to ban most Glider users in September 2005. Blizzard claims that MDY is liable under DMCA §§ 1201(a)(2) and (b)(1) because it thereafter programmed Glider to avoid detection by Warden.

A. The Warden technology

Warden has two components. The first is a software module called “scan.dll,” which scans a computer’s RAM prior to allowing the player to connect to WoW’s servers. If scan.dll detects that a bot is running, such as Glider, it will not allow the player to connect and play. After Blizzard launched Warden, MDY reconfigured Glider to circumvent scan.dll by not loading itself until after scan.dll completed its check. Warden’s second component is a “resident” component that runs periodically in the background on a player’s computer when it is connected to WoW’s servers. It asks the computer to report portions of the WoW code running in RAM, and it looks for patterns of code associated with known bots or cheats. If it detects a bot or cheat, it boots the player from the game, which halts the computer’s copying of copyrighted code into RAM.

B. The Digital Millennium Copyright Act

... The first provision, 17 U.S.C. § 1201(a)(1)(A), is a general prohibition against “circumventing a technological measure that effectively controls access to a work protected under [the Copyright Act].” The second prohibits trafficking in technology that circumvents a technological measure that “effectively controls access” to a copyrighted work. 17 U.S.C. § 1201(a)(2). The third prohibits trafficking in technology that circumvents a technological measure that “effectively protects” a copyright owner’s right. 17 U.S.C. § 1201(b)(1).

C. The district court’s decision

The district court assessed whether MDY violated DMCA §§ 1201(a)(2) and (b)(1) with respect to three WoW components. First, the district court considered the game client software’s **literal elements**: the source code stored on players’ hard drives. Second, the district court considered the game client software’s **individual non-literal elements**: the 400,000+ discrete visual and audible components of the game, such as a visual image of a monster or its audible roar. Finally, it considered the game’s **dynamic non-literal elements**: that is, the “real-time experience of traveling through different worlds, hearing their sounds, viewing their structures, encountering their inhabitants and monsters, and encountering other players.”

The district court granted MDY partial summary judgment as to Blizzard’s § 1201(a)(2) claim with respect to WoW’s literal elements. The district court reasoned that Warden does not effectively control access to the literal elements because WoW players can access the literal elements without connecting to a game server and encountering Warden; they need only install the game client software on their computers. The district court also ruled for MDY following trial as to Blizzard’s § 1201(a)(2) claim with respect to WoW’s individual non-literal elements, reasoning that these elements could also be accessed on a player’s hard drive without encountering Warden. ... The district court, however, ruled for Blizzard following trial as to its §§ 1201(a)(2) and (b)(1) claims with respect to WoW’s dynamic non-literal elements, or the “real-time experience” of playing WoW. ...

We turn to consider whether Glider violates DMCA §§ 1201(a)(2) and (b)(1) by allowing users to circumvent Warden to access WoW’s various elements. MDY contends that

Warden's scan.dll and resident components are separate, and only scan.dll should be considered as a potential access control measure under § 1201(a)(2). However, in our view, an access control measure can both (1) attempt to block initial access and (2) revoke access if a secondary check determines that access was unauthorized. Our analysis considers Warden's scan.dll and resident components together because the two components have the same purpose: to prevent players using detectable bots from continuing to access WoW software.

D. Construction of § 1201

One of the issues raised by this appeal is whether certain provisions of § 1201 prohibit circumvention of access controls when access does not constitute copyright infringement. To answer this question and others presented by this appeal, we address the nature and interrelationship of the various provisions of § 1201 in the overall context of the Copyright Act.

We begin by considering the scope of DMCA § 1201's three operative provisions, §§ 1201(a)(1), 1201(a)(2), and 1201(b)(1). We consider them side-by-side, because "[w]e do not . . . construe statutory phrases in isolation; we read statutes as a whole. Thus, the [term to be construed] must be read in light of the immediately following phrase. . . ."

1. Text of the operative provisions

"We begin, as always, with the text of the statute." Section 1201(a)(1)(A) prohibits "circumvent[ing] a technological measure that effectively controls access to a work protected under this title." Sections 1201(a)(2) and (b)(1) provide that "[n]o person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

§ 1201(a)(2)	§ 1201(b)(1)
(A)	(A)
is primarily designed or produced for the purpose of circumventing a technological measure	is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure
that effectively controls access to a work protected under this title;	that effectively protects a right of a copyright owner;
(B)	(B)
has only limited commercially significant purpose or use other than to circumvent a technological measure	has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure
that effectively controls access to a work protected under this title;	that effectively protects a right of a copyright owner under this title in a work or portion thereof;
(C)	(C)
is marketed by a person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.	is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a portion or work thereof."

(emphasis added).

2. *Our harmonization of the DMCA's operative provisions*

For the reasons set forth below, we believe that § 1201 is best understood to create two distinct types of claims. First, § 1201(a) prohibits the circumvention of any technological measure that effectively controls access to a protected work and grants copyright owners the right to enforce that prohibition. Second, and in contrast to § 1201(a), § 1201(b)(1) prohibits trafficking in technologies that circumvent technological measures that effectively protect “a right of a copyright owner.” Section 1201(b)(1)’s prohibition is thus aimed at circumventions of measures that protect the copyright itself: it entitles copyright owners to protect their existing exclusive rights under the Copyright Act. Those exclusive rights are reproduction, distribution, public performance, public display, and creation of derivative works. 17 U.S.C. § 106. Historically speaking, preventing “access” to a protected work in itself has not been a right of a copyright owner arising from the Copyright Act.

Our construction of § 1201 is compelled by the four significant textual differences between §§ 1201(a) and (b). First, § 1201(a)(2) prohibits the circumvention of a measure that “effectively controls access to *a work protected under this title*,” whereas § 1201(b)(1) concerns a measure that “effectively protects *a right of a copyright owner under this title in a work or portion thereof*.” We read § 1201(b)(1)’s language—“right of a copyright owner under this title”—to reinforce copyright owners’ traditional exclusive rights under § 106 by granting them an additional cause of action against those who traffic in circumventing devices that facilitate infringement. Sections 1201(a)(1) and (a)(2), however, use the term “work protected under this title.” Neither of these two subsections explicitly refers to traditional copyright infringement under § 106. Accordingly, we read this term as extending a new form of protection, i.e., the right to prevent circumvention of access controls, broadly to works protected under Title 17, i.e., copyrighted works.

Second, as used in § 1201(a), to “circumvent a technological measure” means “to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.” 17 U.S.C. § 1201(a)(3)(A). These two specific examples of unlawful circumvention under § 1201(a)—descrambling a scrambled work and decrypting an encrypted work—are acts that do not necessarily infringe or facilitate infringement of a copyright. Descrambling or decrypting only enables someone to watch or listen to a work without authorization, which is not necessarily an infringement of a copyright owner’s traditional exclusive rights under § 106. Put differently, descrambling and decrypting do not necessarily result in someone’s reproducing, distributing, publicly performing, or publicly displaying the copyrighted work, or creating derivative works based on the copyrighted work.

The third significant difference between the subsections is that § 1201(a)(1)(A) prohibits circumventing an effective access control measure, whereas § 1201(b) prohibits trafficking in circumventing devices, but does not prohibit circumvention itself because such conduct was already outlawed as copyright infringement. . . . This difference reinforces our reading of § 1201(b) as strengthening copyright owners’ traditional rights against copyright infringement and of § 1201(a) as granting copyright owners a new anti-circumvention right.

Fourth, in § 1201(a)(1)(B)–(D), Congress directs the Library of Congress (“Library”) to identify classes of copyrighted works for which “noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and the [anti-circumvention] prohibition contained in [§ 1201(a)(1)(A)] shall not apply to such users with respect to such classes of works for the ensuing 3-year period.” There is no analogous provision in § 1201(b). We impute this lack of symmetry to Congress’ need

to balance copyright owners' new anti-circumvention right with the public's right to access the work. . . . [T]he Library is only entitled to moderate the new anti-circumvention right created by, and hence subject to the limitations in, DMCA § 1201(a)(1).

Our reading of §§ 1201(a) and (b) ensures that neither section is rendered superfluous. A violation of § 1201(a)(1)(A), which prohibits circumvention itself, will not be a violation of § 1201(b), which does not contain an analogous prohibition on circumvention. A violation of § 1201(a)(2), which prohibits trafficking in devices that facilitate circumvention of *access* control measures, will not always be a violation of § 1201(b)(1), which prohibits trafficking in devices that facilitate circumvention of measures that protect against *copyright infringement*. Of course, if a copyright owner puts in place an effective measure that both (1) controls access and (2) protects against copyright infringement, a defendant who traffics in a device that circumvents that measure could be liable under both §§ 1201(a) and (b). Nonetheless, we read the differences in structure between §§ 1201(a) and (b) as reflecting Congress's intent to address distinct concerns by creating different rights with different elements.

3. Our construction of the DMCA is consistent with the legislative history

Although the text suffices to resolve the issues before us, we also consider the legislative history in order to address the parties' arguments concerning it. Our review of that history supports the view that Congress created a new anti-circumvention right in § 1201(a)(2) independent of traditional copyright infringement and granted copyright owners a new weapon against copyright infringement in § 1201(b)(1). For instance, the Senate Judiciary Committee report explains that §§ 1201(a)(2) and (b)(1) are "not interchangeable": they were "designed to protect two distinct rights and to target two distinct classes of devices," and "many devices will be subject to challenge only under one of the subsections." That is, § 1201(a)(2) "is designed to protect access to a copyrighted work," while § 1201(b)(1) "is designed to protect the traditional copyright rights of the copyright owner." The Senate Judiciary Committee proffered an example of § 1201(a) liability with no nexus to infringement, stating that if an owner effectively protected access to a copyrighted work by use of a password, it would violate § 1201(a)(2)(A)

[T]o defeat or bypass the password and to make the means to do so, as long as the primary purpose of the means was to perform this kind of act. This is roughly analogous to making it illegal to break into a house using a tool, the primary purpose of which is to break into houses.

The House Judiciary Committee similarly states of § 1201(a)(2), "The act of circumventing a technological protection measure put in place by a copyright owner to control access to a copyrighted work is the electronic equivalent of breaking into a locked room in order to obtain a copy of a book." We note that bypassing a password and breaking into a locked room in order to read or view a copyrighted work would not infringe on any of the copyright owner's exclusive rights under § 106.

We read this legislative history as confirming Congress's intent, in light of the current digital age, to grant copyright owners an independent right to enforce the prohibition against circumvention of effective technological access controls. In § 1201(a), Congress was particularly concerned with encouraging copyright owners to make their works available in digital formats such as "on-demand" or "pay-per-view," which allow consumers effectively to "borrow" a copy of the work for a limited time or a limited number of uses. As the House Commerce Committee explained:

[A]n increasing number of intellectual property works are being distributed using a "client-server" model, where the work is effectively

“borrowed” by the user (e.g., infrequent users of expensive software purchase a certain number of uses, or viewers watch a movie on a pay-per-view basis). To operate in this environment, content providers will need both the technology to make new uses possible and the legal framework to ensure they can protect their work from piracy.

Our review of the legislative history supports our reading of § 1201: that section (a) creates a new anti-circumvention right distinct from copyright infringement, while section (b) strengthens the traditional prohibition against copyright infringement. We now review the decisions of the Federal Circuit that have interpreted § 1201 differently.

4. *The Federal Circuit’s decisions*

The Federal Circuit has adopted a different approach to the DMCA. In essence, it requires § 1201(a) plaintiffs to demonstrate that the circumventing technology infringes or facilitates infringement of the plaintiff’s copyright (an “infringement nexus requirement”).

The seminal decision is *Chamberlain* (Fed. Cir. 2004). In *Chamberlain*, the plaintiff sold garage door openers (“GDOs”) with a “rolling code” security system that purportedly reduced the risk of crime by constantly changing the transmitter signal necessary to open the door. Plaintiff sued the defendant, who sold “universal” GDO transmitters for use with plaintiff’s GDOs, under § 1201(a)(2). The plaintiff alleged that its GDOs and transmitters both contained copyrighted computer programs and that its rolling code security system was a technological measure that controlled access to those programs. Accordingly, plaintiff alleged that the defendant—by selling GDO transmitters that were compatible with plaintiff’s GDOs—had trafficked in a technology that was primarily used for the circumvention of a technological measure (the rolling code security system) that effectively controlled access to plaintiff’s copyrighted works.

The Federal Circuit rejected the plaintiff’s claim, holding that the defendant did not violate § 1201(a)(2) because, *inter alia*, the defendant’s universal GDO transmitters did not infringe or facilitate infringement of the plaintiff’s copyrighted computer programs. The linchpin of the *Chamberlain* court’s analysis is its conclusion that DMCA coverage is limited to a copyright owner’s rights under the Copyright Act as set forth in § 106 of the Copyright Act. Thus, it held that § 1201(a) did not grant copyright owners a new anti-circumvention right, but instead, established new causes of action for a defendant’s unauthorized access of copyrighted material when it infringes upon a copyright owner’s rights under § 106. Accordingly, a § 1201(a)(2) plaintiff was required to demonstrate a nexus to infringement—i.e., that the defendant’s trafficking in circumventing technology had a “reasonable relationship” to the protections that the Copyright Act affords copyright owners. The Federal Circuit explained:

Defendants who traffic in devices that circumvent access controls in ways that facilitate infringement may be subject to liability under § 1201(a)(2). Defendants who use such devices may be subject to liability under § 1201(a)(1) whether they infringe or not. Because all defendants who traffic in devices that circumvent rights controls necessarily facilitate infringement, they may be subject to liability under § 1201(b). Defendants who use such devices may be subject to liability for copyright infringement. *And finally, defendants whose circumvention devices do not facilitate infringement are not subject to § 1201 liability.*

Chamberlain concluded that § 1201(a) created a new cause of action linked to copyright infringement, rather than a new anti-circumvention right separate from copyright infringement, for six reasons.

First, *Chamberlain* reasoned that Congress enacted the DMCA to balance the

interests of copyright owners and information users, and an infringement nexus requirement was necessary to create an anti-circumvention right that truly achieved that balance. Second, *Chamberlain* feared that copyright owners could use an access control right to prohibit exclusively fair uses of their material even absent feared foul use. Third, *Chamberlain* feared that § 1201(a) would allow companies to leverage their sales into aftermarket monopolies, in potential violation of antitrust law and the doctrine of copyright misuse. Fourth, *Chamberlain* viewed an infringement nexus requirement as necessary to prevent “absurd and disastrous results,” such as the existence of DMCA liability for disabling a burglary alarm to gain access to a home containing copyrighted materials.

Fifth, *Chamberlain* stated that an infringement nexus requirement might be necessary to render Congress’s exercise of its Copyright Clause authority rational. The Copyright Clause gives Congress “the task of defining the scope of the limited monopoly that should be granted to authors . . . in order to give the public appropriate access to their work product.” Without an infringement nexus requirement, Congress arguably would have allowed copyright owners in § 1201(a) to deny all access to the public by putting an effective access control measure in place that the public was not allowed to circumvent.

Finally, the *Chamberlain* court viewed an infringement nexus requirement as necessary for the Copyright Act to be internally consistent. It reasoned that § 1201(c)(1), enacted simultaneously, provides that “nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.” The *Chamberlain* court opined that if § 1201(a) creates liability for access without regard to the remainder of the Copyright Act, it “would clearly affect rights and limitations, if not remedies and defenses.”

Accordingly, the Federal Circuit held that a DMCA § 1201(a)(2) action was foreclosed to the extent that the defendant trafficked in a device that did not facilitate copyright infringement.

5. *We decline to adopt an infringement nexus requirement*

While we appreciate the policy considerations expressed by the Federal Circuit in *Chamberlain*, we are unable to follow its approach because it is contrary to the plain language of the statute. In addition, the Federal Circuit failed to recognize the rationale for the statutory construction that we have proffered. Also, its approach is based on policy concerns that are best directed to Congress in the first instance, or for which there appear to be other reasons that do not require such a convoluted construction of the statute’s language.

i. Statutory inconsistencies

Were we to follow *Chamberlain* in imposing an infringement nexus requirement, we would have to disregard the plain language of the statute. Moreover, there is significant textual evidence showing Congress’s intent to create a new anti-circumvention right in § 1201(a) distinct from infringement. As set forth *supra*, this evidence includes: (1) Congress’s choice to link only § 1201(b)(1) explicitly to infringement; (2) Congress’s provision in § 1201(a)(3)(A) that descrambling and decrypting devices can lead to § 1201(a) liability, even though descrambling and decrypting devices may only enable non-infringing access to a copyrighted work; and (3) Congress’s creation of a mechanism in § 1201(a)(1)(B)–(D) to exempt certain non-infringing behavior from § 1201(a)(1) liability, a mechanism that would be unnecessary if an infringement nexus requirement existed. . . .

The *Chamberlain* court reasoned that if § 1201(a) creates liability for access without regard to the remainder of the Copyright Act, it “would clearly affect rights and limitations, if not remedies and defenses.” This perceived tension is relieved by our recognition that § 1201(a) creates a new anti-circumvention right distinct from the traditional exclusive rights of a copyright owner. It follows that § 1201(a) does not limit

the traditional framework of exclusive rights created by § 106, or defenses to those rights such as fair use.¹² We are thus unpersuaded by Chamberlain's reading of the DMCA's text and structure.

ii. Additional interpretive considerations

... *Chamberlain* relied heavily on policy considerations to support its reading of § 1201(a). ... *Chamberlain* feared that § 1201(a) would allow companies to leverage their sales into aftermarket monopolies, in tension with antitrust law and the doctrine of copyright misuse. Concerning antitrust law, we note that there is no clear issue of anti-competitive behavior in this case because Blizzard does not seek to put a direct competitor who offers a competing role-playing game out of business and the parties have not argued this issue. If a § 1201(a)(2) defendant in a future case claims that a plaintiff is attempting to enforce its DMCA anti-circumvention right in a manner that violates antitrust law, we will then consider the interplay between this new anti-circumvention right and antitrust law.

Chamberlain also viewed an infringement nexus requirement as necessary to prevent "absurd and disastrous results," such as the existence of DMCA liability for disabling a burglary alarm to gain access to a home containing copyrighted materials. In addition, the Federal Circuit was concerned that, without an infringement nexus requirement, § 1201(a) would allow copyright owners to deny all access to the public by putting an effective access control measure in place that the public is not allowed to circumvent. Both concerns appear to be overstated, but even accepting them, *arguendo*, as legitimate concerns, they do not permit reading the statute as requiring the imposition of an infringement nexus. As § 1201(a) creates a distinct right, it does not disturb the balance between public rights and the traditional rights of owners of copyright under the Copyright Act. Moreover, § 1201(a)(1)(B)–(D) allows the Library of Congress to create exceptions to the § 1201(a) anti-circumvention right in the public's interest. If greater protection of the public's ability to access copyrighted works is required, Congress can provide such protection by amending the statute.

In sum, we conclude that a fair reading of the statute (supported by legislative history) indicates that Congress created a distinct anti-circumvention right under § 1201(a) without an infringement nexus requirement. Thus, even accepting the validity of the concerns expressed in *Chamberlain*, those concerns do not authorize us to override congressional intent and add a non-textual element to the statute. Accordingly, we reject the imposition of an infringement nexus requirement. We now consider whether MDY has violated §§ 1201(a)(2) and (b)(1).

E. Blizzard's § 1201(a)(2) claim

1. WoW's literal elements and individual non-literal elements

We agree with the district court that MDY's Glider does not violate DMCA § 1201(a)(2) with respect to WoW's literal elements and individual non-literal elements, because Warden does not effectively control access to these WoW elements. First, Warden does not control access to WoW's literal elements because these elements—the game client's software code—are available on a player's hard drive once the game client software is installed. Second, as the district court found:

[WoW's] individual nonliteral components may be accessed by a user

¹² Like the *Chamberlain* court, we need not and do not reach the relationship between fair use under § 107 of the Copyright Act and violations of § 1201. MDY has not claimed that Glider use is a "fair use" of WoW's dynamic non-literal elements. Accordingly, we too leave open the question whether fair use might serve as an affirmative defense to a *prima facie* violation of § 1201.

without signing on to the server. As was demonstrated during trial, an owner of the game client software may use independently purchased computer programs to call up the visual images or the recorded sounds within the game client software. For instance, a user may call up and listen to the roar a particular monster makes within the game. Or the user may call up a virtual image of that monster.

Since a player need not encounter Warden to access WoW's individual non-literal elements, Warden does not effectively control access to those elements.

Our conclusion is in accord with the Sixth Circuit's decision in *Lexmark International v. Static Control Components* (6th Cir. 2004). In *Lexmark*, the plaintiff sold laser printers equipped with an authentication sequence, verified by the printer's copyrighted software, that ensured that only plaintiff's own toner cartridges could be inserted into the printers. The defendant sold microchips capable of generating an authentication sequence that rendered other manufacturers' cartridges compatible with plaintiff's printers.

The Sixth Circuit held that plaintiff's § 1201(a)(2) claim failed because its authentication sequence did not effectively control access to its copyrighted computer program. Rather, the mere purchase of one of plaintiff's printers allowed "access" to the copyrighted program. Any purchaser could read the program code directly from the printer memory without encountering the authentication sequence. The authentication sequence thus blocked only one form of access: the ability to make use of the printer. However, it left intact another form of access: the review and use of the computer program's literal code. The Sixth Circuit explained:

Just as one would not say that a lock on the back door of a house "controls access" to a house whose front door does not contain a lock and just as one would not say that a lock on any door of a house "controls access" to the house after its purchaser receives the key to the lock, it does not make sense to say that this provision of the DMCA applies to otherwise-readily-accessible copyrighted works. Add to this the fact that the DMCA not only requires the technological measure to "control access" but requires the measure to control that access "effectively," 17 U.S.C. § 1201(a)(2), and it seems clear that this provision does not naturally extend to a technological measure that restricts one form of access but leaves another route wide open.

Here, a player's purchase of the WoW game client allows access to the game's literal elements and individual non-literal elements. Warden blocks one form of access to these elements: the ability to access them while connected to a WoW server. However, analogously to the situation in *Lexmark*, Warden leaves open the ability to access these elements directly via the user's computer. We conclude that Warden is not an effective access control measure with respect to WoW's literal elements and individual non-literal elements, and therefore, that MDY does not violate § 1201(a)(2) with respect to these elements.

2. *WoW's dynamic non-literal elements*

We conclude that MDY meets each of the six textual elements for violating § 1201(a)(2) with respect to WoW's dynamic non-literal elements. That is, MDY (1) traffics in (2) a technology or part thereof (3) that is primarily designed, produced, or marketed for, or has limited commercially significant use other than (4) circumventing a technological measure (5) that effectively controls access (6) to a copyrighted work.

The first two elements are met because MDY "traffics in a technology or part thereof"—that is, it sells Glider. The third and fourth elements are met because Blizzard has established that MDY *markets* Glider for use in circumventing Warden, thus satisfying

the requirement of § 1201(a)(2)(C).¹⁶ . . . The sixth element is met because, as the district court held, WoW's dynamic non-literal elements constitute a copyrighted work.

The fifth element is met because Warden is an effective access control measure. To "effectively control access to a work," a technological measure must "in the ordinary course of its operation, require[] the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work." Both of Warden's two components "require[] the application of information, or a process or a treatment . . . to gain access to the work." For a player to connect to Blizzard's servers which provide access to WoW's dynamic non-literal elements, scan.dll must scan the player's computer RAM and confirm the absence of any bots or cheats. Moreover, Warden's provisions were put into place by Blizzard, and thus, function "with the authority of the copyright owner." Accordingly, Warden effectively controls access to WoW's dynamic non-literal elements. We hold that MDY is liable under § 1201(a)(2) with respect to WoW's dynamic non-literal elements. . . .

F. Blizzard's § 1201(b)(1) claim

Blizzard may prevail under § 1201(b)(1) only if Warden "effectively protect[s] a right" of Blizzard under the Copyright Act. Blizzard contends that Warden protects its reproduction right against unauthorized copying. We disagree.

First, although WoW players copy the software code into RAM while playing the game, Blizzard's EULA and ToU authorize all licensed WoW players to do so. We have explained that ToU § 4(B)'s bot prohibition is a license covenant rather than a condition. Thus, a Glider user who violates this covenant does not infringe by continuing to copy code into RAM. Accordingly, MDY does not violate § 1201(b)(1) by enabling Glider users to avoid Warden's interruption of their *authorized* copying into RAM.

Second, although WoW players can theoretically record game play by taking screen shots, there is no evidence that Warden detects or prevents such allegedly infringing copying. This is logical, because Warden was designed to reduce the presence of cheats and bots, not to protect WoW's dynamic non-literal elements against copying. We conclude that Warden does not effectively protect any of Blizzard's rights under the Copyright Act, and MDY is not liable under § 1201(b)(1) for Glider's circumvention of Warden. . . .

VII.

. . . [W]e determine that MDY is not liable for secondary copyright infringement and is liable under the DMCA only for violation of § 1201(a)(2) with respect to WoW's dynamic non-literal elements. . . .

¹⁶ To "circumvent a technological measure" under § 1201(a) means to "descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, *without the authority of the copyright owner*." A circuit split exists with respect to the meaning of the phrase "without the authority of the copyright owner." The Federal Circuit has concluded that this definition imposes an additional requirement on a § 1201(a)(2) plaintiff: to show that the defendant's circumventing device enables third parties to access the copyrighted work without the copyright owner's authorization. *See Chamberlain*. The Second Circuit has adopted a different view, explaining that § 1201(a)(3)(A) plainly exempts from § 1201(a) liability those whom a copyright owner authorizes to circumvent an access control measure, not those whom a copyright owner authorizes to access the work. *Corley*. We find the Second Circuit's view to be the sounder construction . . . and conclude that § 1201(a)(2) does not require a plaintiff to show that the accused device enables third parties to access the work without the copyright owner's authorization. Thus, Blizzard has satisfied the "circumvention" element of a § 1201(a)(2) claim, because Blizzard has demonstrated that it did not authorize MDY to circumvent Warden.