

Catch 1201: An Analysis of Discourse in the  
2000 and 2003 DMCA Anticircumvention Hearings

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Presented at the 2005 AEJMC Convention, Aug. 10-13, San Antonio, TX  
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## I. Introduction

For almost the entire twentieth century, copyright law was of limited interest to the general public; today, copyright debates have punctured “the bubble of public consciousness and become important global policy questions.”<sup>1</sup> While Napster played a vital role in bringing these issues to light,<sup>2</sup> the legislative developments of 1998 are more likely to have a profound, lasting impact on the development and use of copyrighted content and technology in the coming century. That is the year when the Digital Millennium Copyright Act (DMCA)<sup>3</sup> and Sonny Bono Copyright Term Extension Act (CTEA)<sup>4</sup> became law. While the CTEA has certainly been important in its own right, culminating in the highly visible US Supreme Court case *Eldred v. Ashcroft*<sup>5</sup>, the DMCA has been the most important of the 32 amendments to the Copyright Act of 1976.<sup>6</sup> While the Act contains other important sections, the most important part of the DMCA is the “WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998,” a ban on the circumvention of technological protection measures of digital content,<sup>7</sup> embodied in Section 1201.<sup>8</sup>

The proscription on circumvention of technological protection measures (TPM) that is embodied in Section 1201 consists of three separate bans. The basic ban prohibits circumventing a TPM to gain unauthorized access to copyrighted works.<sup>9</sup> The other two bans are on trafficking in tools that effectuate the circumvention of a TPM that controls access to works<sup>10</sup> or determines the uses to which a legally acquired information product may be put (e.g., copy-control technologies).<sup>11</sup> Once one legally acquires a product, one can still circumvent a use-control TPM for purposes such as fair use,<sup>12</sup> and there are a handful of statutory exemptions from one, two, or all three prohibitions for users such as “nonprofit libraries, archives, and educational institutions,”<sup>13</sup> law enforcement personnel,<sup>14</sup> and encryption researchers.<sup>15</sup>

This brief description cannot do justice to this statute, which is horribly complicated<sup>16</sup>. Little wonder, then, that hundreds of articles have already considered the statute and its resulting case law at varying lengths.<sup>17</sup> Yet even greater confusion seems certain to emerge from the triennial assessments of the impact of this bill on the users of copyrighted works. An assessment of this process is focus of this paper.

For two years after the statute became effective, the ban on circumvention did not come into effect; this period ran from October 28, 1998 to October 28, 2000. During that period and every three years hence:

The Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination in a rulemaking proceeding ... of whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition ... in their ability to make noninfringing uses under this title of a particular class of copyrighted works.<sup>18</sup>

To facilitate this proceeding, the Copyright Office holds hearings to determine whether exemptions to the general ban are appropriate and what those should be.<sup>19</sup> This is a significant deviation from the previous role of administrative hearings in the area of copyright law, which have historically considered only technical matters,<sup>20</sup> leaving interpretation of issues such as fair use to the courts.<sup>21</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>22</sup>

In this paper, we report the preliminary results of a content analysis of this stakeholder input as well as the solicitations for testimony and the final rulings. While this data is rich enough to justify a much larger project, we focus our initial analysis on questions of legislative intent and the establishment of the rules of the game.

The debate conducted during this rulemaking procedure is worth considering for at least two reasons. First, as a microcosm of the broader copyright debate, it reveals a good deal about how the stakeholders view copyright law generally, Section 1201 specifically, and the value of additional exemptions to its ban on circumvention and circumvention technology. On this count, we conclude that the rhetoric of the various stakeholders reflects the battle lines of the broader copyright debate, while drawing those lines in sharper relief than is reflected in the published literature. Second, as a specialized policymaking venue that can only consider certain types of arguments, the hearings limit and shape the discursive choices of stakeholders. On this count, we conclude that this rhetoric is shaped markedly by the nature of the venue and of its rules.

In Section II, we consider the literature on political agendas, policymaking institutions and venue shifting, and policy framing as a basis for examining the instant case. In Section III, we discuss US copyright law generally and Section 1201 specifically. In Section IV, we summon some of the published literature on copyright and 1201 as a means of anticipating the arguments

we would expect to see in the written and oral testimony. In Section V, we describe the hearings process. In Section VI, we analyze stakeholder rhetoric, focusing especially on discourse about the rules of the game. Finally, in Section VII, we line this rhetoric up against the outcome of the hearings and draw conclusions about the impact of this strategic venue shift.

## II. Policy Formation and Change

Frank Baumgartner and Bryan Jones have explored the ways in which public policy agendas have shifted over time in an attempt to understand the ways in which power and influence over the process has been exercised. They have paid particular attention the role that ideas and their articulations have played in the periodic rise and fall of support for policies and practices on the national agenda.<sup>23</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>24</sup> is part of 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 an alternative policy frame can be established as the basis for a swing in the direction of policy alternatives.<sup>25</sup> Congressional hearings with carefully chosen testimony from expert witnesses and stakeholders are identified as critical institutional resources that can be mobilized by policy entrepreneurs in support of policy agendas.

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>26</sup> We have reason to expect a shift in the framing of issues in the emerging policy debate, not only because of the unusual shift of venue from the Legislature and the courts to the Library of Congress, but also because of the greater level of participation in these debates by relative newcomers to intellectual property policymaking circles. It is when newcomers enter traditionally settled areas of law and

policy that new ideas, arguments and perspectives are introduced and have the possibility shifting the frame of reference.<sup>27</sup>

#### A. Agendas

A central goal of an agenda setting effort 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. The list of stakeholders that have been identified as having common or competing interests in the outcome of contemporary debates about intellectual property in a digital age<sup>28</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 well being is tied up in its distribution and sale. There are also significant differences among those we might identify as users and their agents. 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>29</sup>

#### B. Institutions and Shifts in Venue

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. While members of the copyright industries have traditionally exercised considerable power within the traditional domains of copyright policymaking,<sup>30</sup> the recent involvement of additional stakeholders, including consumers and their advocates, has led the industry to seek additional venues where their influence is also likely to be substantial.<sup>31</sup> Success in the international policy arena, including the World Intellectual Property Organization (WIPO) has increased the ability to these interests to pursue strategic shifts in venue at the domestic level.<sup>32</sup>

Although civil liberties groups have had some success in raising privacy concerns in legislative hearings in the past,<sup>33</sup> they had virtually no experience in or privileged access to the kinds of proceedings that would take place under the auspices of the Librarian of Congress. We assume that the decision to assign responsibility for the assessment of the impact of Section 1201 to the Librarian of Congress, and the staff of the Copyright Office, reflected more of a response

to the concerns of the copyright industries<sup>34</sup> than to the concerns of those seeking to preserve their options under claims of a fair use exception. In light of judicial willingness to recognize exceptions to copyright such as fair use,<sup>35</sup> the movement of such issues to an administrative hearing is easily characterized as a venue shift that reduces the limitations on the copyright monopoly.<sup>36</sup>

### C. Strategic Framing

We understand the critical role that the framing of the policy agenda plays in the determination of policy outcomes.<sup>37</sup> Stakeholders understand that “if you’re dissatisfied with the way the spoils are getting divided, one approach is to change the rhetoric” and this is precisely what Litman suggests has been done with regard to copyright.<sup>38</sup> Copyright interests began in the 1970’s to transform the way we think about copyright as a bargain between authors and the public into a story about the defense of property against those who would steal it.

Vital components of this process include not only how participants frame the issues, but also how they frame or characterize other participants as well.<sup>39</sup> This is often observed in efforts to identify some actors as central while marginalizing others.<sup>40</sup> Framing activities not only seek to develop a “web of subsidies”<sup>41</sup> that support the achievement of policy goals, but they are also directed toward the development of coalitions<sup>42</sup> that might contribute to the momentum required to bring about the transformation of a formerly stable policy bargain.

Policy scholars who have focused on the ways in which issues are framed in the context of congressional testimony provide numerous examples of a given interest group’s attempts to “shape legislator’s perceptions in ways that would lend advantage to its own interests.”<sup>43</sup>

The analysis of policy frames is especially helpful in understanding how status and power are negotiated within new policy venues, such as the Library of Congress. It is important to examine policy-related discourse over a period of time, especially in the early stages of venue development because this is a time when arguments about jurisdiction and responsibility are most critical to shaping the direction of future policy debates.

## III. Copyright policy in the US

### A. Stronger, less coherent, and in search of the perfect venue

Amidst widespread fear by copyright holders that peer-to-peer trading will destroy their industries, the debate over copyright law “has degenerated into a steadily intensifying war of words and legal action.”<sup>44</sup> In addition to the music industry, copyright holders from electronic

voting machine manufacturers<sup>45</sup> to religious organizations<sup>46</sup> have resorted to cease-and-desist notices and lawsuits in a trend toward ever-greater copyright litigiousness. Yet copyright holders have not only used the courts to fight back against unapproved use of their materials. They have successfully lobbied Congress for several significant revisions of copyright law, complicating Title 17 considerably. The resulting trend is a “limitless bloating” of copyright law, both in duration and scope.<sup>47</sup> The ever-increasing reach of copyright law includes at least two significant changes that are fairly straightforward. First, “in a process that began in earnest with the Copyright Act of 1976 and culminated in successor legislation like the Berne Convention Implementation Act, the Copyright Renewal Act, and the Copyright Term Extension Act, Congress pared back, and in some instances entirely discarded, copyright formalities.

In addition to increasing reach and decreasing the coherence of copyright law, another critical feature of emerging copyright law over the last several years has been the increasing number of venues claiming jurisdiction. Venue shopping is such an important practice in the development of copyright law today that copyright holders, unhappy with the venue they had, effectively lobbied for the creation of a more favorable one.<sup>48</sup> Yet the clearest instance of venue shopping is the path to the DMCA.

#### B. The path to Section 1201 and the final product

Shortly after President Clinton’s inauguration, Patent Commissioner Bruce Lehman began working to deliver as much legal control as possible over digital content to copyright holders.<sup>49</sup> Yet resistance quickly grew in Congress, thanks largely to the lobbying effort spearheaded by the Digital Future Coalition.<sup>50</sup> During this time, Lehman was also trying to build international support for an international treaty by the US that could leverage stricter copyright law into the rest of the world’s law books.<sup>51</sup>

In the end, even though final language of the WIPO Copyright Treaty<sup>52</sup> was much weaker than Lehman had hoped,<sup>53</sup> it contained a new anticircumvention provision that was “used as a basis for greatly enhanced copyright owner control.”<sup>54</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>55</sup> Instead, Congress used the Treaty as an excuse to implement a much more sweeping ban on circumvention and to accomplish a significant shift in venues.

As noted briefly in the introduction, Section 1201 implements three different bans. The first ban (or the “basic ban”) prohibits circumventing a TPM to gain unauthorized access to copyrighted works. For example, it is a violation of this ban to circumvent the password protection of a database containing copyrighted materials. The second ban is on trafficking in tools that would assist one in the type of behavior prohibited by the basic ban. We refer to this second ban as the “access controls ban.” As one example, where the basic ban prohibits circumventing database password protections, the access controls ban prohibits the development or circulation of password-cracking software.

The third ban (the “additional violations ban”) prohibits trafficking in devices that circumvent any TPM that “effectively protects a right of a copyright owner under this title in a work or a portion thereof.”<sup>56</sup> This prohibits the circumvention of a TPM that protects *any* copyright holder’s right, most notably including the right to prohibit gratuitous copying. This is broader than, and almost completely subsumes, the access controls ban. If congress had wanted to ban any technology that circumvented any TPM, the additional violations language would have been almost adequate. 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 also “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 “fair use” exemption because one can legally circumvent use control technologies to engage in fair use. Yet such fair uses are still difficult to achieve for most users, as the tools to conduct such a circumvention remain illegal.

In addition to the fair use exemption, the statute affirmatively recognizes seven exemptions, excusing classes of users from varying combinations of the basic ban, the access trafficking ban, or the additional violations ban on trafficking in technologies that circumvent use controlling (but not access controlling) TPMs. This mass of hyper-specific exemptions is confusing, erratic, and irrational,<sup>57</sup> so we omit further consideration of this topic here.

#### IV. How the copyright debate is framed

##### A. Framed generally

Neil Netanel provides an excellent overview of the two primary theories of copyright that are competing for the right to guide national and international governance. On one side, several thinkers as well as “United States and European Union officials have aggressively promoted the view of cultural expression as a commodity of trade”<sup>58</sup> This is a broad, neoliberal vision of the copyright monopoly “that extend[s] to every conceivable valued use.”<sup>59</sup> In contrast, Netanel and others offer a democratic copyright paradigm.<sup>60</sup> This democratic paradigm has informed the “free culture” movement,<sup>61</sup> which is responsible for most of the public rhetoric in opposition to the expansion of copyright law. Before we summarize some of their arguments, however, we summarize some of the main arguments of the neoliberal camp.

1. Neoliberals<sup>62</sup>

The primary trope deployed by neoliberals is one of property rights. This is perhaps their most prominent argument across all venues. “The copyright industries regularly employ the rhetoric of private property to support their lobbying efforts and litigation.”<sup>63</sup> Based on this premise, a neoliberal view of copyright generally views unpermitted uses of content as theft of property, comparable or even equal to the theft of real property. Infringements constitute the “misappropriation and distribution of copyrighted property and the destruction of a copyright owner's rights to that property.”<sup>64</sup> On this count, the copyright industry has achieved considerable success in its effort to frame the debates regarding peer-to-peer networks and access to digital media as a debate about “stealing” and “theft”.<sup>65</sup>

In addition to the rhetoric of property rights, neoliberals are quick to insist on the growing economic significance of the copyright industries. In passing the DMCA, Congress pointed out that industries trading in copyrighted content constitute a significant portion of the US economy generally and the leading sector for US exports specifically.<sup>66</sup> Additionally, this importance is depicted as rising precipitously with no end in sight.<sup>67</sup>

Finally, neoliberals often represent all unintended uses of copyrighted materials in highly moralistic, otherizing terms, especially “piracy.” Sometimes, this is used to refer to activity that is clearly infringing and illegal,<sup>68</sup> though even then it is a questionable application of a word that originally referred to “[r]obbery, kidnapping, or other criminal violence committed at sea [or] aboard a plane or other vehicle.”<sup>69</sup> Even more dramatically, it is commonly used to marginalize all activities that are not explicitly authorized by copyright owners, even though this implicitly includes several noninfringing activities.

## 2. Free culture movement

The starting point for most in the free culture movement is the belief that the primary goal of copyright law is and should be to promote creative expression for the betterment of society. From that starting point, their most central critique of copyright law's continued expansion is that strong copyright law actually reduces the production and/or dissemination of culturally and politically important works. All creativity builds on previous creative works,<sup>70</sup> and more broadly speaking, it requires the freedom to create without fear of punishment.<sup>71</sup> The escalation of copyright, they argue, has gone so far as to reduce creative output.

While these authors generally acknowledge the importance of some copyright protection, they tend to advance a vision of copyright that provides just enough incentive to create rather than a property-like right of ownership over the expression of ideas.<sup>72</sup>

Free culture writers also insist that strict copyright is a threat to free expression. They cite a number of anecdotes and bemoan how copyright is being used for "protecting authors from criticism. ... The law has become a tool for effectively disabling the ability of others to criticize a corporation"<sup>73</sup> or any other powerful institution or individual.

### B. Framing the DMCA's anticircumvention provision

No TPM is perfect, and some degree of legal protection of TPMs is acknowledged by many, even some among the free culture movement, as an important contribution to the protection afforded by copyright. We briefly review the views of those who are roughly characterized as "pro-1201" (those who support the law as it stands or would perhaps even strengthen it) and those who are "anti-1201" (those who would weaken or perhaps even eliminate it), respectively.

#### 1. Pro-1201

Extending the property rights trope described above, the pro-1201 side's primary argument is that copyright owners need TPMs to preserve their property rights. In light of arguments on behalf of fair use, Allan Adler, speaking for the Association of American Publishers, argued that "the fair use doctrine has never given anyone a right to break other laws for the stated purpose of exercising the fair use privilege. Fair use doesn't allow you to break into a locked library in order to make 'fair use' copies of the books in it, or steal newspapers from a vending machine in order to copy articles and share them with a friend."<sup>74</sup> If copyright is like a

traditional property right, then the right to prevent unwelcome intruders is absolute—even if one cannot prevent guests from being rude.

Another significant argument is that, by protecting TPMs, 1201 preserves the economic incentive for producing new content and developing new and innovative delivery mechanisms—as well as the associated economic growth. Thanks to digital technology, “widespread private copying in the aggregate could radically reduce the incentive to create any given work of authorship.”<sup>75</sup> Lawsuits against infringing individuals are “prohibitively expensive and politically unwise.”<sup>76</sup> Therefore, the pro-1201 argument goes, TPMs serve as an important measure “to protect any work published and distributed via the Web or in a digital medium.”<sup>77</sup> Because of this additional protection, and extending the economic importance argument developed above, pro-1201 commentators argue that anticircumvention protections carry additional economic benefits. “Congress and Commentators who support § 1201 justify its enactment mainly because of the impact and significance it will have on the economy—specifically the copyright and e-commerce industries.”<sup>78</sup>

The pro-1201 rhetoric also continues the moralistic, otherizing tone present in the broader copyright debate—again, especially revolving around the trope of piracy. In the simplest such terms, “these anti-circumvention provisions were meant to keep pirates from defeating anti-piracy protections added to copyrighted works, and to ban devices intended for such purposes.”<sup>79</sup> While “pirate” is the epithet of choice, the others are still deployed. Luke Antonsen goes so far as to argue that the law must stop “hackers,” “crackers,” and “bootlegg[ers],” even if this means eliminating any 1<sup>st</sup> Amendment rights in computer code.<sup>80</sup>

One final, more moderate trope is that the supposed fears of the free culture movement in light of 1201 have not yet been reached, so there is not yet a need for reform. These authors hold out the potential that reform may someday be necessary, but “pursuing these alternatives may be premature, because technological protections are not yet as pervasive or as intrusive as critics have feared. ... [M]any works are and will continue to remain available; and many privileged uses do not require digital, or even mechanical copying.”<sup>81</sup> This position generally holds that certain market conditions may ensue that necessitate appropriate reforms, but that is not the case now.

## 2. Anti-1201

The main rhetorical trope of those who oppose 1201 is that it will reduce the ability of users to make fair use and other privileged uses of copyrighted materials. “The anti-circumvention provisions of the DMCA create legal protections for the technological measures that copyright owners use to control content. Users who wish to use copyrighted works for noninfringing purposes will not be able to obtain the tools necessary for their purposes.”<sup>82</sup>

Legal traditions such as fair use and the first sale doctrine have preserved the effective ability to make all sorts of unintended and/or noninfringing uses, the argument goes, and these legal traditions are destroyed by 1201. It is framed as part of “the efforts of the content industries to create a ‘leak-proof’ sales and delivery system, ... triple-sealed by copyright, contract, and digital locks. Then they can control access, use, and ultimately the flow of ideas and expression.”<sup>83</sup> Those who wish to use works in ways unintended by the content provider will be able to ask for different licensing terms, but considering that some copyright holders are unwilling even to provide an alternative to TPM-laden products to provide for basic compatibility,<sup>84</sup> this is unlikely in many cases. This broad worst-case-scenario argument is that society will move from a first-sale paradigm to a “pay-per-use” model in which every valuable use of a work is paid for by the user according to her willingness to pay.

In addition to pay-per-use fears, opponents contend Section 1201 poses a threat to programming and other types of technological exploration, especially encryption research.<sup>85</sup>

Third, opponents contend that the statute may be invoked to deter competition in technological fields. Critics regularly cite two cases in which a technology manufacturer claims copyright in a TPM itself and then uses 1201 to prevent aftermarket competition in products such as garage door openers<sup>86</sup> and printer cartridges.<sup>87</sup>

The fourth and final common criticism is that the exemptions recognized by the statute itself and the Librarian of Congress are inadequate to preserve rights such as fair use. This trope takes many forms, but one particularly common version is that the permanent ban on trafficking guts any exemptions to the general ban; even if somebody is allowed to access TPM-protected works, it is almost always illegal for anybody to help her do so.<sup>88</sup> Therefore, “[u]sers who wish to use copyrighted works for constitutionally protected purposes will not be able to obtain the tools necessary for their purposes.”<sup>89</sup>

V. Hearings explained

Beginning in 2000 and every three years thereafter, the Librarian of Congress is charged with determining exemptions to the general ban on circumvention that shall apply for the following three years. The rulemaking is conducted to “determine whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the [general ban] in their ability to make noninfringing uses ... of a particular class of copyrighted works.”<sup>90</sup>

The statute does not provide much detail, leaving open such important questions as to the burden of proof, standards of evidence, and nature of the exemptions. Combined with the venue’s novelty, this very vagueness sets up a near-perfect storm for a struggle over the rules of the game. Because this is *the* point of contention in this initial analysis, we save that discussion for Section VII.

#### VI. Analysis of Stakeholder Frames

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

- 1) What are the primary 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 Librarian of Congress?

The raw materials for our analysis come from the publicly available records of the 2000 and 2003 hearings, from Notice of Inquiry through final ruling. The Copyright Office has posted every word of both rulemaking proceedings on its website,<sup>91</sup> greatly facilitating our study. The 2000 hearings featured 235 written comments, 129 reply comments, and 31 individual testimonials.<sup>92</sup> The 2003 hearings featured 51 comments, 338 reply comments, 63 individual testimonials, and 25 written replies to 9 post-hearing questions.<sup>93</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 offers almost a thousand documents for analysis. To reduce this to a somewhat more manageable load, we only considered the 441 of these documents that are over 1 page long—a length we believe is necessary to begin developing a cohesive argument.<sup>94</sup> We loaded these 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.

A. Coding by witness type

To begin our analysis, we hand coded all 441 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." Table Two shows how commenters and witnesses were divided across eight categories.

Insert Table One Here
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This table makes clear that 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.

Insert Table Two Here
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Literally anybody can submit a written comment or reply comment, and that is reflected in the fact that a majority of these documents are by authors claiming no institutional affiliation. Note, however, the large disparity in which witness types present live testimony, which we believe says something about the level of access enjoyed by each witness type. To demonstrate this, 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) are delivered in person, and comparably favorable ratios are enjoyed by the nonprofit advocacy groups (48%) and the media industry (46%). Education (36%) and technology (27%) enjoy somewhat lower rates, though in the case of technology submissions, this is 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.

For the sake of this preliminary analysis, we restricted our search to those documents discussing legislative intent. To accomplish this task, 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 121 documents (27%), of which 20 were question and answer sessions, which we have not included for this preliminary study.<sup>95</sup> Of the remaining 101 documents, witnesses were again far more likely to exhibit 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.

Insert Table Three Here
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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 stakeholders that stand to profit from copy-control technology (e.g., Macrovision Inc.) and those who can profit from technologies that may violate 1201 (e.g., Static Control Components), is understandably divided.

B. Exploring the context of “legislative intent” claims

Based on the string search for legislative intent claims, we hand-coded each of the 101 documents to determine the overall context of these claims. Jumping to each “hit” within each document, we examined the broader argument within which the claim was found and coded the document accordingly. Based on this analysis, we found over 60 unique argumentative tropes. We also coded these documents based on whether they are in support of an exemption to the general ban on TPM circumvention, in opposition, or are mixed (e.g., supporting some exemptions and opposing others) or neutral (taking no position). Table 4 summarizes the tropes that appeared in at least four documents.

Insert Table Four Here
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The cleavage between the two sides could hardly be clearer. Only one document that either supports or opposes features a trope from the other side, and this document features just one such trope. The only 3 “mixed” documents were the three final rulings by the Register and/or the Librarian, and 5 of the 6 “neutral” documents were documents laying the ground rules such as Notices of Inquiry. In such an oppositional forum, we expected as much, but the extent

of the gap was unexpected. We were also surprised by the gap in procedural claims. While the anti-exemption witnesses and the hearings' stewards relied heavily on rules discourse—which side has the burden of proof, the height of that burden, the intent of the legislation, and the impacts that adjudicators should weigh—the pro-exemption side was almost silent on these matters.

The bulk of pro-exemption discourse surrounding legislative intent centers on claims that the statute or copyright law as a whole is intended to preserve fair use (45 of 54 documents), and argues that without a given exemption, 1201 will erode fair use. These appeals often refer specifically to subsections of 1201 such as the statute's insistence that "[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use."<sup>96</sup> Several documents also refer to other sections of copyright law such as the unaltered section that defines fair use.<sup>97</sup>

One could read many of these arguments as making the implicit claim that decisions can and should be made according to ordinary cost-benefit analysis, though this is a poor fit with the data. Only 1 of 54 pro-exemption speakers explicitly invokes the statute's guidelines which suggest that the hearing must weigh 1201's threats to fair use against an exemption's threats to content production. Rather, we believe that this rhetoric models the discourse of the copyright defendant in a courtroom setting, where this side of the debate enjoys presumption and where such affirmative defenses to copyright have historically succeeded.

A nontrivial number of witnesses do try to adapt to the new venue with rules-based arguments including: exemptions should be defined based partly or wholly on the intended use rather than the properties of the work itself (7), the burden of proof should be possible (6), and the pro-exemption side meets its burden of proof (5). Overall, however, the pro-exemption side appeals to broader social goods and legal concepts.

While pro-exemption witnesses appeal to broad social and legal principles, anti-exemption witnesses are moderate to heavy users of procedural claims. One third (13/38) invoke the statute's language to insist that fair use claims can be outweighed by threats to content production. Over half (22) specifically insist that those who propose an exemption have the burden of proof, and almost all of those (21) frame the burden as difficult to meet. A great number (30) insist that those who propose an exemption have failed to meet their burden of proof. Nearly half (18) rebut specific pro-exemption arguments as being beyond the Librarian's

authority, often suggesting that Congress would be a more appropriate venue. Many declare that a proposed exemption is illegitimate, either because it is too broad (15) or based in the traits of the work's users rather than the actual work (9).

All told, the anti-exemption side made few arguments appealing to broader social or legal principles, attempting instead to defeat individual pro-exemption arguments through appeals to the new venue's rules and requirements.

Perhaps even more remarkable than this stark division is the palpable sense that the language of the final rulings more closely resembled the anti-exemption side of the debate. While granting or recommending exemptions, the rulings express some concern that fair use will otherwise be eroded and that those who propose these exemptions have met their burden of proof. The consistent resemblance, however, ends there.

Only two of the three rulings argue that the statute intends to preserve fair use. Only one insists that a proposed class for exemption is sufficiently narrow (against charges that it is too broad) or that a given exemption is not a threat to content production. Only one ruling mentions the fear that a ban on circumvention of access controls will envelop use controls. And none of the rulings attacks a given interpretation of 1201 as eroding fair use or the first sale doctrine.

In much closer alignment with anti-exemption rhetoric, all three final rulings deploy each of the following arguments in rejecting one or more proposed exemptions: the exemption threatens the production of content; the burden of proof is on those who propose an exemption; that burden is not met; certain arguments for an exemption are out of bounds in this venue; and alternative formats eliminate the need for an exemption.

The clearest alignment between the final rulings and anti-exemption interests centers on the dispute over what counts as a "class of works" that is eligible for an exemption. All three final rulings (as well as a good number of the "rules" documents such as Notices of Inquiry) specifically insist that exemptions must be narrowly tailored (e.g., "audiovisual works" is too broad a category), must not be defined based on traits of their users (e.g., educational institutions), and must not be defined merely in terms of the TPMs that are applied (e.g., CSS, which encrypts DVDs). Little wonder the final exemptions are for hyper-specific classes of works such as literary works in eBook format that have turned off text-to-speech functionality. Witnesses who ask for general-purpose exemptions, which would allow the courts to apply prior case law on noninfringing uses in a broad range of circumstances, are rebuffed and referred back

to Congress. Of course, recall that Congress overwhelmingly passed the DMCA as written and insisted that this hearing process would ensure the continued viability of fair use.

## VII On Parting (With Fair Use)

David Nimmer argues that Section 1201 “seems to be a conscious contraction of user rights.”<sup>98</sup> Our analysis of the process for determining exemptions buttresses this critique. Those who oppose exemptions triumphantly leverage the rules of the hearings to their advantage. Their regular insistence that a given proposed exemption is too broad and is therefore a matter to be taken up by Congress—and *not* the courts—is a clear allusion to the shift of venue; Congress has explicitly washed its hands by creating the hearings. Opponents’ mantra that proponents face a high burden of proof and a difficult task in defining a “class of works” indicates that they perceive this venue as friendly. The arguments of exemption proponents, conversely, reveal flagging efforts to find a foothold in a hostile venue. Proponents rarely discuss the rules of the hearings, and those who do are more likely to rail against the interpretations of the statute or the statute itself than they are to trumpet the rules. The final rulings and recommendations bear a much closer resemblance to the rhetoric of opponents than to that of proponents; this is 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 implies that her hands are tied when it comes to helping proponents. This study therefore reveals a pattern in which proponents, opponents, and adjudicators all implicitly agree that the new venue places a heavy thumb on one side of the scales.

The DVD Content Scrambling System is the single most controversial TPM scheme considered in the hearings; despite hundreds of calls for an exemption and documented harms to fair use, it remains unscathed by the hearings. 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 a Linux machine or using 15 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 administrative hearing. 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 Section 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.

For those who support a strong, categorical ban on all circumvention, Section 1201 is not ideal, but it is a marked improvement over the pre-DMCA era. The mere application of a TPM to copyrighted content provides a degree of legal protection above and beyond traditional copyright, and technologies to defeat TPMs are forbidden. While narrow exemptions are a triennial threat, the venue for determining them is unfriendly to broad or use-based exemptions that could threaten large categories of media products.

For those who oppose the broad ban on circumvention and circumvention-enabling technologies, however, this state of affairs is beyond frustrating. They argue that TPMs are being deployed in ways that erode the legal rights of users, librarians, scholars, and critics. They insist that the statute endangers fundamental values such as freedom of speech and the right to tinker. Wherever they make these arguments, however, they are dismissed and told to look elsewhere. In the digital millennium, fair use is homeless.

**Table 1: Number of documents by witness type**

<b>Witness Type</b>	<b>Examples/Description</b>	<b># doc's</b>	<b>% of total</b>
Media firms	Publishing, recorded music, TV, radio, webcasters, media industry associations (e.g., RIAA)	53	12.0 %
Technology firms	Consumer electronics, computer hardware, business software, e-security products, web filtering software, copy-control technology	84 <sup>99</sup>	19.0 %
Education	Colleges & universities only	22	5.0%
Library	Library associations, official representatives of individual libraries, the Internet Archive	26	5.9%
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)	33	7.5%
Government	Those who are steering the proceedings (e.g., Register of Copyrights), other officials (e.g., Idaho State Controller's Office)	29	6.6%
Self	Those who disavow or do not present any official affiliation	166	38%
Joint Reply Commenter	Attorney hired by multiple firms to oppose exemptions	11	2.5%
Question & Answer	Involved multiple witnesses during live hearings.	22	5%

**Table 2: Type of Participation by Witness Type**

<b>Witness Type</b>	<b>Comment</b>	<b>Reply Comment</b>	<b>Oral Testimony</b>	<b>Post-Hearing Comment<sup>100</sup></b>	<b>Rules<sup>101</sup></b>	<b>Rulings<sup>102</sup></b>
Media	5	20	21	7	-	-
Tech	18	38	21	7	-	-
Education	9	5	8	-	-	-
Library	2	9	12	3	-	-
Nonprofit	8	7	14	4	-	-
Gov't	1	2	-	-	23	3
Self	97	62	7	-	-	-
Joint Reply Commenter	-	-	6	5	-	-

**Table 3: “Legislative Intent” Documents by Witness Type**

<b>Witness Type</b>	<b>Total</b>	<b>Number Retrieved</b>	<b>% Total</b>	<b>Of Documents Retrieved, Number Supporting/Opposing Exemption</b>			
				<b>Support</b>	<b>Oppose</b>	<b>Mixed</b>	<b>Neutral</b>
Media	53	25	47%	4	21	-	-
Tech	84	29	33%	12	17	-	-
Education	22	10	50%	10	-	-	-
Library	26	6	23%	6	-	-	-
Nonprofit	33	15	45%	15	-	-	-
Gov't	29	8	28%	-	-	3	5
Self	166	8	5%	8	-	-	-
JRC	6	4	67%	-	3	-	1
<b>Total</b>	419	101	24%	54	38	3	6

**Table 4: Frequency of Arguments by Support/Opposition**

<b>Trope</b>	<b># Pro-Exemp</b>	<b># Anti-Exemp</b>	<b># Mixed</b>	<b># Neutral</b>	<b>Total<sup>103</sup></b>
Without an exception, 1201 will shrink fair use <sup>104</sup>	42	-	3	2	47
1201 intends to preserve fair use	45	-	2	-	47
Intent of other copyright law is to preserve fair use	13	-	1	0	14
(Attacking an interpretation as shrinking fair use)	8	-	-	-	8
Effects of 1201 will be to eliminate first-sale doctrine	6	-	-	-	6
Intent was not to eliminate first-sale	4	-	-	-	4
Proposed class of works as sufficiently narrow.	3	-	1	-	4
Exemptions can legitimately be based on class of users	7	-	-	1	8
Urges a use-based exemption	7	-	-	-	7
The statute is unclear	7	-	2	1	10
Burden of proof should be possible	6	-	-	1	7
Exemption is not a threat to content production	5	-	1	-	6
Ban on circumventing access controls will envelop circumvention of use controls	9	-	1	-	10
The pro-exemption side					

meets its burden of proof	4	-	3	-	7
Must weigh decline in creative output against harms to noninfringing users	1	13	3	3	20
Proposed exemption threatens creative output	-	20	3	-	23
Burden of proof is on those who propose exemptions	-	22	3	5	30
(Frames burden of proof as high/ difficult to meet)	-	21	2	4	27
Pro-exemption arguments fail burden of proof	-	30	3	1	34
Alternative (e.g., analog) formats remove the need for an exemption	-	5	3	2	10
1201 will not cause alleged negative effects on fair use	-	5	2	-	7
Cited pro-exemption arguments are irrelevant in this venue	-	18	3	-	21
A proposed class of works is too broad	-	15	3	2	20
A proposed class is wrongly based on traits of users, not of the works themselves	-	9	3	-	12
A proposed class of works cannot be defined by TPMs	-	2	3	-	5
Fair use concerns are not relevant	-	8	1	-	9
First sale concerns are not					

relevant	-	3	1	-	4
Librarian of Congress/ Register of Copyrights interpret statute correctly	-	2	2	-	4
<b>TOTAL</b>	<b>54</b>	<b>38</b>	<b>3</b>	<b>6</b>	<b>101</b>

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

<sup>2</sup> 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, 333-350 (2003); see also, Matt Jackson, *Using Technology to Circumvent the Law: The DMCA's Push to Privatize Copyright*, 23 HASTINGS COMM. & ENT. L.J. 607, 609 (2001).

<sup>3</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat 2860, (1998).

<sup>4</sup> Sonny Bono Copyright Term Extension Act, Pub L. No. 105-298, 112 Stat. 2827 (1998) (extending the copyright term from the author's lifetime plus fifty years to life plus seventy years; herein "CTEA").

<sup>5</sup> *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (ruling that the CTEA is constitutional, regardless of court-acknowledged policy objections). This ruling was a devastating defeat for Stanford Professor Lawrence Lessig, who explored the impact of this decision in his recent book. See LAWRENCE LESSIG, *FREE CULTURE* 228-248 (2004).

<sup>6</sup> See David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. COPYRIGHT SOC'Y US 401, 402 (1999).

<sup>7</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 embrace 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 Tarlton Gillespie, *Copyright and Commerce: The DMCA, Trusted Systems, and the Stabilization of Distribution*, 20 THE INFO. SOC'Y 239, 243-245 (2004) for a discussion of how the plans of DRM schemes such as "trusted" devices involve a total lockdown of all uses of media content. See generally 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>8</sup> 17 U.S.C. § 1201.

<sup>9</sup> *Id.* § 1201(a)(1)(A).

<sup>10</sup> *Id.* § 1201(a)(2).

<sup>11</sup> *Id.* § 1201(b).

<sup>12</sup> *Id.* § 1201(c).

<sup>13</sup> *Id.* § 1201(d).

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<sup>14</sup> *Id.* § 1201(e).

<sup>15</sup> *Id.* § 1201(g).

<sup>16</sup> COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS AND THE EMERGING INFORMATION INFRASTRUCTURE, NATIONAL RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 318-321 (2000) [hereinafter *DIGITAL DILEMMA*].

<sup>17</sup> A search in Westlaw's "Journals & Law Reviews" database for "(\"digital millennium copyright act\" dmca d.m.c.a.) /p 1201" (retrieving all references to the act's title in the same paragraph as the number "1201") retrieves 619 documents as of March 20, 2005.

<sup>18</sup> 17 U.S.C. § 1201(a)(1)(C)

<sup>19</sup> *E.g.*, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Inquiry, 57 Fed. Reg. 63,578 (October 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>20</sup> Nimmer, *supra* note 7, at 697.

<sup>21</sup> *Id.*, at 696.

<sup>22</sup> JESSICA LITMAN, *DIGITAL COPYRIGHT* 57-63 (2001).

<sup>23</sup> *See generally*, FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (1993).

<sup>24</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* 124-132 (2001).

<sup>25</sup> BAUMGARTNER & JONES, *supra* note 23, at 237-243. *See also* Hernan Galperin, *Beyond Interests, Ideas and Technology: An Institutional Approach to Communication and Information Policy*, 20 *THE INFO. SOC'Y* 159, 162-164 (2004) (discussing the conceptual framework of new institutionalist analysis and its applicability in the analysis of telecommunications and media governance), and 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>26</sup> *DIGITAL DILEMMA*, *supra* note 16.

<sup>27</sup> *See* Frank R. Baumgartner et al., *Advocacy and Policy Argumentation* 15-16 (conference paper presented to the 2000 Annual Meeting of the American Political Science Association, Washington, DC).

<sup>28</sup> *DIGITAL DILEMMA*, *supra* note 16, at 65-75.

<sup>29</sup> LITMAN, *supra* note 22, at 124.

<sup>30</sup> *Id.* at 138.

<sup>31</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."

<sup>32</sup> *See* David Bach, *The Double Punch of Law and Technology: Fighting Music Piracy or Remaking Copyright in a Digital Age?* 6 *BUS. & POL.*, 18-22 (Article 3, Issue 2, 2004), at <http://www.bepress.com/bap/vol6/iss2/art3> (discussing international venue shopping).

<sup>33</sup> Oscar H. Gandy, Jr., *Public Opinion Surveys and the Formation of Privacy Policy*, 59 *J. OF SOC. ISSUES* 283 (2003).

<sup>34</sup> The members of the copyright industries and the gross revenues reported by their individual sectors are identified in U.S. CONGRESS, CONGRESSIONAL BUDGET OFFICE, *COPYRIGHT ISSUES IN*

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DIGITAL MEDIA, at 4 (August 2004), *available at* <http://www.cba.gov/ftpdocs/57xx/doc5736/08-09Copyright.pdf>.

<sup>35</sup> 17 USC § 107. *See, e.g.*, *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), and *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9<sup>th</sup> Cir. 1992).

<sup>36</sup> Jackson, *supra* note 2, at 639.

<sup>37</sup> *See generally*, OSCAR H. GANDY, JR., *THE GREAT FRAME ROBBERY. THE STRATEGIC USE OF PUBLIC OPINION IN THE FORMATION OF MEDIA POLICY* (Report to the Ford Found., Grant 1025-1178), *available at* [http://www.asc.upenn.edu/usr.ogandy/Final\\_Report\\_to\\_Ford.pdf](http://www.asc.upenn.edu/usr.ogandy/Final_Report_to_Ford.pdf) (2003).

<sup>38</sup> LITMAN, *supra* note 22, at 79.

<sup>39</sup> *See* Zhondang Pan & Gerald M. Kosicki, *Framing as a Strategic Action in Public Deliberation*, in *FRAMING PUBLIC LIFE*, 35, 44 (Stephen D. Reese, Oscar H. Gandy, Jr., & August E. Grant eds., 2003).

<sup>40</sup> A classic example of this strategy at work can be seen in the efforts of policy elites to characterize the nuclear freeze movement. *See* Robert M. Entman & Andrew Rojecki, *Freezing Out the Public: Elite and Media Framing of the U.S. Anti-Nuclear Movement*, 10 *POL. COMM.* 155 (1993).

<sup>41</sup> Pan & Kosicki, *supra* note 39, at 44-47.

<sup>42</sup> This process is often discussed in terms of “frame alignment” and associated aspects of social movement engagement with the policy process. *See generally*, David A. Snow, et al., *Frame Alignment Process, Micromobilization, and Movement Participation*, 51 *AM. SOC. REV.* 464 (1986).

<sup>43</sup> Priscilla Murphy & Michael Maynard, *Framing the Genetic Testing Issue: Discourse and Cultural Clashes Among Policy Communities*, 22 *SCI. COMM.* 133, 134 (2000).

<sup>44</sup> Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 *HARV. J.L. & TECH.* 1, 1 (2003), *available at* <http://ssrn.com/abstract=468180>.

<sup>45</sup> KEMBREW MCLEOD, *FREEDOM OF EXPRESSION@: OVERZEALOUS COPYRIGHT BOZOS AND OTHER ENEMIES OF CREATIVITY* 237-244 (2004).

<sup>46</sup> *Id.* at 215-216.

<sup>47</sup> LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 106 (2001).

<sup>48</sup> Bach, *supra* note 32, at 18-22.

<sup>49</sup> LITMAN, *supra* note 22, at 90-91 (2000).

<sup>50</sup> *Id.* at 124-125.

<sup>51</sup> *Id.* at 129.

<sup>52</sup> WIPO Copyright Treaty, adopted by the Diplomatic Conference on Dec. 20, 1996, WIPO Doc. CRNR/DC/94 (Dec. 23, 1996).

<sup>53</sup> Litman, *supra* note 22, at 129.

<sup>54</sup> *Id.* at 131.

<sup>55</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>56</sup> 17 U.S.C. § 1201(b)(1).

<sup>57</sup> Nimmer, *supra* note 7, at 675.

<sup>58</sup> Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 *VAND. L. REV.* 217, 219-220 (1998).

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<sup>59</sup> NEIL WEINSTOCK NETANEL, *COPYRIGHT AND A DEMOCRATIC CIVIL SOCIETY* 1 (1998) (UMI dissertation number 99-09538).

<sup>60</sup> Netanel, *supra* note 58, at 220.

<sup>61</sup> Several names have been and continue to be used, including “copyleft” and “copyfighters,” but the “free culture” label achieved a certain currency after the publication of the book by LESSIG, *supra* note 5.

<sup>62</sup> This term is ironic at best, considering the extent to which government has intervened beyond the “free market” vision of minimalist laws. *See, e.g.*, Samuelson, *supra* note 55, and Nimmer, *supra* note 7. *See also* Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management,”* 97 MICH. L. REV. 462 (1998), which contrasts the ever-expanding government regulation of intellectual property law with the *Lochner*-esque “free market” rhetoric proffered by the “strong IP” camp. This rhetoric elides the dependence on government not to protect something that is naturally property-like, but to propertize something that is naturally non-rivalrous and non-excludable. *See* GILLIAN DOYLE, *UNDERSTANDING MEDIA ECONOMICS*, 154-160, for a description of the atypical economic properties of media products.

<sup>63</sup> Netanel, *supra* note 44, at 22.

<sup>64</sup> Carolyn Andrepont, *Digital Millennium Copyright Act: Copyright Protections for the Digital Age*, 9 DEPAUL-LCA J. ART & ENT. L. 397, 398 (1999).

<sup>65</sup> *See, e.g.*, Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT L. J. 1, 23 (2004) (comparing the theft frame with those of “sharing” and “learning,” as the use of downloaded information about population genetics might be framed).

<sup>66</sup> S. Rep. 105-190, at 10 (1998).

<sup>67</sup> STEPHEN E. SIWEK, *COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2002 REPORT* (2002), available at [http://www.iipa.com/pdf/2002\\_SIWEK\\_FULL.pdf](http://www.iipa.com/pdf/2002_SIWEK_FULL.pdf).

<sup>68</sup> *See, e.g., Id.*, at 5.

<sup>69</sup> BLACK’S LAW DICTIONARY (8<sup>TH</sup> ed. 2004).

<sup>70</sup> LESSIG, *supra* note 47, at 9, 204.

<sup>71</sup> *See generally*, LESSIG, *supra* note 5, & MCLEOD, *supra* note 45.

<sup>72</sup> SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 5 (2001).

<sup>73</sup> LESSIG, *supra* note 47, at 185, 187.

<sup>74</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 Intellectual Property of the House Comm. on the Judiciary 105th Cong. 78-82 (1997) at 208 (prepared statement of Allan Adler).

<sup>75</sup> Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 Va. L. Rev. 813, 818 (2001). In the article, Lunney contends that the Act too heavily favors copyright holders, though this quote is a lucid representation of industry fears.

<sup>76</sup> *Id.* at 819.

<sup>77</sup> Mauricio Espana, *The Fallacy that Fair Use and Information Should Be Provided For Free: An Analysis of the Responses to the DMCA’s Section 1201*, 31 FORDHAM URB. L.J. 135, 148 (2003).

<sup>78</sup> *Id.* at 191.

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<sup>79</sup> Elissa A. Santo, *The Impact of the Digital Age on Copyright Law*, 231-Dec N.J. Law. 29, 31 (2004).

<sup>80</sup> Luke Antonsen, *Expanding the DMCA: The Importance of Regulating Computer Code*, 21 J. Marshall J. Computer & Info. L. 567, 567-568.

<sup>81</sup> June M. Besek, *Anti-Circumvention Laws And Copyright: A Report From The Kernochan Center For Law, Media And The Arts*, 27 COLUM. J.L. & ARTS 385, 390 (2004).

<sup>82</sup> Jackson, *supra* note 2, at 608.

<sup>83</sup> SIVA VAIDHYANATHAN, THE ANARCHIST IN THE LIBRARY: HOW THE CLASH BETWEEN FREEDOM AND CONTROL IS HACKING THE REAL WORLD AND CRASHING THE SYSTEM, 52-53 (2004).

<sup>84</sup> *Id.* at 55-56. (Citing a letter from EMI to a customer who complained that his CD did not work as promised. “[W]e can assure you that it is only a matter of months until more or less every CD released worldwide will include copy protection. To that end, we will do everything in our power, whether you like it or not.”)

<sup>85</sup> *Id.* at 55.

<sup>86</sup> Chamberlain Group, Inc. v. Skylink Technologies, Inc., 381 F.3d 1178 (Fed. Cir. 2004).

<sup>87</sup> Lexmark Intern., Inc. v. Static Control Components, Inc., 253 F.Supp.2d 943 (E.D. Ky. 2003).

<sup>88</sup> Nimmer, *supra* note 7, at 736-737.

<sup>89</sup> Jackson, *supra* note 2, at 610.

<sup>90</sup> 17 U.S.C. § 1201(a)(1)(C).

<sup>91</sup> U.S. Copyright Office, Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works (2003), *available at*: <http://www.copyright.gov/1201/index.html>. (Hereinafter, “2003 Hearings.” Includes link to 2000 hearings.)

<sup>92</sup> U.S. Copyright Office, Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works (2000), *available at*: <http://www.copyright.gov/1201/anticirc.html>. (Hereinafter, “2000 Hearings.”)

<sup>93</sup> 2003 Hearings, *supra* note 91.

<sup>94</sup> After coding the longer documents as described below, we returned to a random sample of 50 of the 462 comments that were excluded for being one page or less in length. Of these 50 documents—all of which oppose 1201 generally and/or support one or more exemptions with varying clarity—only 3 discuss legislative intent, and only 11 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 36 out of 50, or 72% of the total.

<sup>95</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.

<sup>96</sup> 17 U.S.C. § 1201(c)(1).

<sup>97</sup> *Id.* at § 107.

<sup>98</sup> Nimmer, *supra* note 7, at 739.

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<sup>99</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.

<sup>100</sup> 2003 only; answers to 9 written questions offered to those who gave oral testimony.

<sup>101</sup> Documents that 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>102</sup> Final recommendations by the Register of Copyrights (2000 and 2003) and final ruling by the Librarian of Congress (included as part of Register’s recommendations in 2000; issued as separate document in 2003).

<sup>103</sup> Just three documents had arguments for some exemptions and against others; these were the three final recommendations and/or rulings (a jointly issued document in 2000 featuring the final recommendations of the Register of Copyrights and the Librarian’s final ruling, and two separately issued documents in 2003), all of which involved approving some exemptions and denying others.

<sup>104</sup> In an effort to remain true to the argumentation of witnesses, this category includes a large number of claims that are not necessarily tied to “fair use” exclusively in the sense laid out in 17 U.S.C. § 107. Witnesses often tied pro-exemption arguments to claims of fair use but rarely 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.