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This Content is Unavailable in Your Geographic Region: The United States' and the European Union's Implementation of Anti-Circumvention Measures

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ABSTRACT

Recently, people streaming movies and TV shows have begun to use virtual private networks (VPNs) to access content that streaming services restrict to certain geographic regions. Because of the ambiguity in international law and the implementation of the World Intellectual Property Organization (WIPO) Copyright Treaty, domestic law fails to offer streaming services a recourse to sue foreign VPN users. The WIPO Copyright Treaty established an anti-circumvention provision that would seem to apply to using VPNs to stream from other countries. But because of the provision's ambiguity, many of the WIPO Copyright Treaty member countries have adopted different standards. This problem is exemplified by the United States and the European Union (EU). The United States adopted the Digital Millennium Copyright Act from the WIPO Copyright Treaty's language, but the US circuit courts have split on whether circumventing a technological measure requires a connection to an infringement of US copyright law. Similarly, the EU member countries have also split on whether their respective domestic laws require a connection to domestic infringement. This has resulted in varying regimes, harming the WIPO Copyright Treaty's goal of harmonizing international copyright law. But if the United States were to adopt the Austrian implementation of this treaty provision, the United States would take steps toward fulfilling the WIPO Copyright Treaty's goal of harmonization. Specifically, the United States should adopt a statute that creates liability for circumventing a technological measure for the purposes of streaming a copyrighted work.

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I. INTRODUCTION

While the COVID-19 pandemic rages on across the world, so too does the torrent of illegal copyright streaming. With billions of people around the world staying indoors, the use of illegal streaming sites has

risen dramatically.[1] In the United States, Congress introduced legislation to create felony liability for websites that stream copyrighted content illegally.[2] As these changes to US copyright law were hidden within an omnibus spending bill for COVID-19 relief, content creators around the globe began to voice outrage, not only because of the furtive means by which the bill was passed, but also because of the perceived effect it would have on content creation writ large.[3] These content creators mistakenly believed that this bill would create felony liability for Digital Millennium Copyright Act (DMCA) strikes.[4] Their outrage begin to percolate throughout the internet, and soon thereafter "#StopDMCA" began to trend on Twitter.[5] Despite this noise, none of the acts within the spending bill made any changes to the DMCA.[6] While these criticisms were misplaced, all the attention

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1. *See* Aric Jenkins, *As Coronavirus Force People Home, Interest in Streaming Services Is Surging. So Is Piracy.*, FORTUNE (Mar. 29, 2020, 7:00 AM), https://fortune.com/2020/03/29/coronavirus-streaming-piracy/ [https://perma.cc/7SJP-LQCF] (archived Dec. 27, 2021).

2. *See* Jordan Valinsky, *10 Years in Prison for Illegal Streaming? It's in the Covid-19 Relief Bill*, CNN (Dec. 22, 2020), https://www.cnn.com/2020/12/22/tech/illegal-streaming-felony-covid-relief-bill/index.html [https://perma.cc/NPN2-7N2P] (archived Dec. 27, 2021) (explaining the emergence of the new acts dealing with intellectual property).

3. *See* Eriq Gardner, *The COVID-19 Stimulus Bill Would Make Illegal Streaming a Felony*, HOLLYWOOD REP. (Dec. 21, 2020, 11:32 AM), https://www.hollywoodreporter.com/business/business-news/the-covid-19-stimulus-bill-would-make-illegal-streaming-a-felony-4108333/ [https://perma.cc/UR2V-BJZF] (archived Dec. 27, 2021) (showing examples of changes the bill sought to make to US copyright law); *see also* Sieeka Khan, *Stop DMCA: Petition to Ditch Copyright Bill that Could Imprison Twitch Streamers Now Online*, TECH TIMES (Dec. 20, 2020, 6:12 PM), https://www.techtimes.com/articles/255231/20201220/stop-dmca-petition-ditch-copyright-bill-imprison-twitch-streamers-now.htm [https://perma.cc/Y45R-HWQ4] (archived Dec. 27, 2021).

4. A DMCA strike is a website's method of complying with the DMCA's notice and take down provision by notifying a content creator that his or her video has been reported for containing copyright-protected content. In other words, a DMCA strike relates to a website's liability under the DMCA, not the content creator's liability.

5. Ryan Galloway, *#StopDMCA Trends on Twitter Following Details of U.S. Senator's Controversial Bill*, DOT ESPORTS (Dec. 16, 2020, 9:42 PM), https://dotesports.com/streaming/news/stopdmca-trends-on-twitter-following-details-of-u-s-senators-controversial-bill [https://perma.cc/F3UK-Y4ZW] (archived Dec. 27, 2021); *see also* Anita K. Sharma, *Recent DMCA Notices on Twitch and What this Means for Gaming Creators*, TALKING INFLUENCE (Aug. 16, 2021), https://talkinginfluence.com/2021/08/16/recent-dmca-notices-on-twitch-and-what-this-means-for-gaming-creators/ [https://perma.cc/TBL3-KDPR] (archive Dec. 27, 2021) (broadly explaining what a DMCA strike is).

6. For more specifics on what changes were made to US copyright law, see Makena Kelly, *Sweeping New Copyright Measures Poised to Pass in Spending Bill*, VERGE (Dec. 21, 2020, 3:54 PM), https://www.theverge.com/2020/12/21/22193976/covid-relief-spending-congress-copyright-case-act-felony-streaming [https://perma.cc/46XH-YKV9] (archived Dec. 27, 2021) (explaining the copyright law changes proposed by the bill). Some have criticized these content creators for targeting the Senator who proposed the Protecting Lawful Streaming Act and the music industry lobbyists who had initially

on the DMCA indicates something important: there is public support for Congress to revisit the DMCA and examine how one of its provisions affects copyright streaming.

Specifically, Congress should examine the anti-circumvention provision of the DMCA. This provision seeks to prevent users from bypassing technological measures that control access to copyrighted works. The problem with this provision is that, by imprecisely defining circumvention, it has allowed users to bypass geo-blocking restrictions with impunity. To understand how Congress should best amend the anti-circumvention provision, it is necessary to understand how these geo-blocking practices apply to content consumers and how international developments have led to the ambiguity that makes the DMCA's anti-circumvention provision ineffective.

Recently, in part due to the COVID-19 pandemic, the use of streaming platforms has risen. As people began to stream content through streaming services more frequently, they noticed that a service's library of shows changed based on their geographic location. This practice of restricting content based on a user's geographic region is known as geo-blocking. With geo-blocking, Netflix and other streaming services are able to negotiate different licenses with the owners of the shows and movies they stream, customizing their libraries to the desires of a given geographic location.[7] From a user's perspective, this means that a person accessing Netflix in, for example, Canada will see a different collection of available shows than will a person accessing Netflix in the United States.[8]

Perturbed by these restrictive practices, many users in the United States began turning to services that bypass geo-blocking restrictions.[9] Specifically, virtual private networks (VPNs) allow a user to change

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lobbied for the DMCA. *See* Jon Blistein, *Music's Whac-A-Mole Menace: How the Moldy, Lopsided DMCA Is Hurting Artists*, ROLLING STONE (Oct. 27, 2021, 11:29 AM), https://www.rollingstone.com/music/music-features/dmca-youtube-twitch-spotify-apple-1239258/ [https://perma.cc/UD3Y-L7MZ] (archived Dec. 27, 2021).

7. *See* Claire Reilly, *Why You Can't have Everything: The Netflix Licensing Dilemma*, CNET (Jan. 14, 2016), https://www.cnet.com/news/why-you-cant-have-everything-the-netflix-licensing-dilemma/ [https://perma.cc/794L-LG25] (archived Dec. 27, 2021).

8. *See* Taos Turner, *Video Streaming Geo-Blocking Gets Workaround*, WALL ST. J. (Apr. 16, 2015, 9:34 PM), https://www.wsj.com/articles/video-streaming-geo-blocking-gets-workaround-1429234440 [https://perma.cc/ESN4-X9AT] (archived Dec. 27, 2021).

9. *See* Shannon Williams, *New Research Reveals Most Desired Blocked Internet Content*, SECURITYBRIEF (Aug. 14, 2020), https://securitybrief.eu/story/new-research-reveals-most-desired-blocked-internet-content [https://perma.cc/2TY8-XZ8B] (archived Dec. 27, 2021) (detailing a study determining which websites users frequently attempted to circumvent geo-blocking measures on, with the most popular being YouTube—a website for streaming videos); *see also* Michael Bolen, *Netflix Canada Vs. Netflix USA: Why Do We Get the Shaft?*, HUFFPOST (Dec. 13, 2013, 5:45 AM), https://www.huffingtonpost.ca/2013/12/13/netflix-canada-vs-us_n_4435459.html [https://perma.cc/5A98-K5SQ] (archived Dec. 27, 2021) (explaining how many Canadians have begun using VPNs to access geo-blocked content due to the lack of available titles on Netflix Canada).

his or her internet protocol address (IP address) to one from a different country, making the user appear to be accessing the content from a different country.[10] In fact, many of the companies offering VPN services explicitly advertise that their services are *designed* to be used to access American Netflix from anywhere in the world.[11] Beyond the possibility that this conduct is a breach of Netflix's terms of service,[12] this type of conduct may cause the US user to face civil liability under American copyright law.[13]

That users are able to "change" their geographic location using VPNs is problematic because the United States is a party to a number of international treaties governing copyright. These treaties have sought to harmonize the scope of international intellectual property (IP) law. But these international treaties only set the minimum standards of IP protection, resulting in a sea of differing copyright regimes, which vary between countries.[14] Thus, because countries have

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10. *See generally* Mohammad Taha Khan, Joe DeBlasio, Geoffrey M. Voelker, Alex C. Snoeren, Chris Kanich, & Narseo Vallina-Rodriguez, *An Empirical Analysis of the Commercial VPN Ecosystem*, *in* IMC '18: PROCEEDINGS OF THE INTERNET MEASUREMENT CONFERENCE 2018 443, 443–44 (2018) (providing a general overview on the use of VPNs to circumvent geo-blocking measures); *see also* Josh Taylor, *Australians Encouraged to Bypass Netflix Geo-Block*, ZDNET (July 3, 2013) https://www.zdnet.com/article/australians-encouraged-to-bypass-netflix-geo-block/ [https://perma.cc/FCT4-HYMX] (archived Feb. 10, 2022) (explaining that many Australian users are using VPN services to access Netflix's geo-blocked US library).

11. *E.g.*, *How to Watch U.S. Netflix with a VPN*, EXPRESSVPN, https://www.expressvpn.com/vpn-service/netflix-vpn [https://perma.cc/WLX3-6YDP] (archived Dec. 27, 2021). Curiously, ExpressVPN's article includes an admonition that the service is "not intended to be used as a means of copyright circumvention." *Id.*

12. *Netflix Terms of Use*, NETFLIX, https://help.netflix.com/legal/termsofuse [https://perma.cc/K5MZ-LX9Q] (archived Dec. 29, 2021) ("4.3. You may access Netflix content primarily within the country in which you have established your account and only in geographic locations where we offer our service and have licensed such content."). In fact, it appears that Netflix has implemented technology that allows the company to detect the use of VPNs and has been preventing users from accessing content when using a VPN. *See* Jacob Parker, *How Does Netflix Detect and Block VPN Use?*, TECHRADAR (Aug. 21, 2021), https://www.techradar.com/vpn/how-does-netflix-detect-and-block-vpn-use [https://perma.cc/274U-9TGZ] (archived Dec. 29, 2021) (describing Netflix's access control protections).

13. *See generally* Circumvention of Copyright Protection Systems, 17 U.S.C.A. § 1201 (establishing liability for the circumvention of technological protection measures).

14. *See* A HANDBOOK ON THE WTO TRIPS AGREEMENT 13–14 (Antony Taubman, Hannu Wager, & Jayashree Watal eds., 2012) (describing the varying implementation of international copyright because of the minimum standards of protection required by international agreements); *see also* BLAYNE HAGGART, COPYFIGHT: THE GLOBAL POLITICS OF DIGITAL COPYRIGHT REFORM 129 (2014) (noting that the international treaties have given countries the freedom to adopt varying standards of copyright protection); Sam Bulte, *Closing the Copyright Gap; Our Major Trading Partners Have Brought Their Copyright Laws into the Digital Age While We Lag Sadly Behind*, TORONTO STAR, Jan. 22, 2006, at D09 (explaining the difficulty in getting Canada to follow norms of other intellectual property regimes). *See generally* Andrea Antonelli, *Applicable Law Aspects of Copyright Infringement on the Internet: What Principles*

implemented international copyright treaties differently, it is not always the case that the same act offends both US copyright law and another country's law, even though both countries' laws were modeled after the same treaty provision.

In the context of using VPNs to bypass geo-blocking restrictions, the anti-circumvention provision of the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) exemplifies the problem of varying levels of copyright protection.[15] Broadly, this provision prohibits a user from circumventing an effective technological measure that protects a copyrighted work.[16] In implementing this provision, countries have established various standards for determining when a technological measure is circumvented. The treaty language was created with ambiguity as a result of US and European Union (EU) influence on the treaty negotiation process, and because of this ambiguity, the US circuit courts and the EU member states have both individually split on whether the act of circumvention is itself sufficient for liability, or whether the act of circumvention must have a connection to copyright infringement.[17]

This Note will examine the WCT, focusing on the implementation of its anti-circumvention provision in the United States and the EU to solve the problem created by VPN streaming. To understand the WCT's role in international copyright law, this Note begins by explaining the WCT's formulation, its focus on harmonizing international copyright law, and how the United States' and the EU's agendas forged the anti-circumvention provision. Next, this Note will explain the interpretation of the WCT's anti-circumvention provision in both the US circuit courts and the EU member countries. Particular focus will be on the interpretation of US law by the Ninth and Federal Circuit Courts, which will be compared to Sweden's and Austria's enacted laws. This comparison will highlight that Sweden's and Austria's statutes each share similarities to the Ninth Circuit's and Federal Circuit's interpretations, respectively. From this comparison, it will further be shown that the Austrian regime requires a specific

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Should Apply?, SING. J. LEGAL STUD. 147 (2003) (explaining the international copyright law regimes).

15. *See generally* WIPO Copyright Treaty art. 11, Dec. 20, 1996, S. TREATY DOC. NO. 105-17 (1997) [hereinafter WCT].

16. *See* HAGGART, *supra* note 14, at 18.

17. *Compare* Chamberlain Grp., Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1195–96 (Fed. Cir. 2004) (requiring the act of access be connected to an infringing act), *and* MDY Indus., LLC v. Blizzard Ent., Inc., 629 F.3d 928, 944 (9th Cir. 2010) (holding that copyright holders have a separate right, distinct from the other exclusive rights of copyright, to enforce the anti-circumvention provision), *with* Lucie Guibault, Guido Westkamp, & Thomas Rieber-Mohn, *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, 2012 UNIV. AMSTERDAM 97 (explaining that EU member states have split on whether the act of circumvention itself is sufficient or whether the act must be connected to an act of copyright infringement).

intent to circumvent. This intent requirement is the most sensible way to fulfill the WCT's goal of harmonization and to properly balance the interests of content creators and users. Accordingly, this Note concludes by advocating for a change in US law by proposing the United States adopt a provision that creates liability where a user circumvents a technological protection measure with the intent to stream a copyrighted work.

II. BACKGROUND

The anti-circumvention provision's ambiguity becomes relevant when a foreign user utilizes a VPN to select a US-based server to access a streaming service's catalogue. In this instance, the use of a VPN is necessary because the streaming service geo-blocks its content. Because this process involves citizens of one nation accessing copyrighted material stored physically in another country, it implicates the international treaties governing international IP infringement. International IP law has sought to adapt to the internet through numerous IP treaties. One of these treaties, the WCT, created the provision prohibiting the use of technology to circumvent digital protection measures. This anti-circumvention provision is, however, ambiguous, in part as a result of US and EU influence. Thus, this Part will begin by explaining VPNs and geo-blocking before turning to the development of international law. This Part will then introduce the WCT and the development of its anti-circumvention provision, before finally addressing how US and EU influence created the ambiguity within this provision.

A. *Geolocation, Geo-blocking, and VPNs*

This subpart begins by describing VPNs and geo-blocking as well as how the two are relevant to streaming online and digital protection measures.

A VPN is a way for a user to access the internet using a virtual network that encrypts the user's data. The network is virtual because it can use a public or private network to transmit data, it is private because it uses encryption that users control, and it is a network because devices and systems communicate along a common path.[18] Put another way, a VPN utilizes a connection through a network where the user transmits data from her device onto a separate network.[19] While

18. *See* Perry B. Gentry, *What is a VPN?*, 6 INFO. SEC. TECH. REP. 15, 16 (2001).

19. *See* Mat Paget, *What is a VPN and How Does It Give You a Gaming Advantage?*, GAMESPOT (Mar. 3, 2021, 2:50 PM), https://www.gamespot.com/articles/what-is-vpn-gaming-advantages/1100-6488322/ [https://perma.cc/6DRU-P6MA] (archived Jan. 3, 2022).

the data is in transit, the data is encrypted and unable to be accessed by users outside the network.[20]

Geo-blocking is a method by which a user's access to content is restricted based on her geographical location.[21] Content providers often use geo-blocking services on their streaming sites to discriminate as to who can stream their content.[22] Geo-blocking relies on geolocation technology.[23] Some methods of geo-blocking are simple, such as requesting the user identify her location when accessing a site.[24] However, the more common methods that websites use are either through a device's GPS capabilities or a computer's IP address.[25] Using an IP address provides a rough estimate of a computer's location, as IP addresses, though typically not permanent, are assigned based on a user's location.[26]

So how do VPNs circumvent these geolocation services? As explained above, most websites use IP trackers. Once a VPN service is selected, it establishes an encrypted tunnel between a device and a server that is located in another geographic location from the user.[27] The server then creates a new IP address in the foreign country, effectively masking the user's actual IP address.[28] As a result, the user's IP address then appears as if it is from the same country as the server. Thus, if Netflix only allows streaming of *Love Island* in the United States, a user in Germany can use a VPN to generate a US IP address and stream the otherwise geo-blocked content.

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20. *See* Max Eddy, *Do I Need a VPN at Home?*, PCMAG UK (Mar. 5, 2021, 3:08 PM), https://uk.pcmag.com/vpn/117675/do-i-need-a-vpn-at-home [https://perma.cc/PB35-3FCE] (archived Jan. 3, 2022).

21. *See* Tal Kra-Oz, *Geoblocking and the Legality of Circumvention*, 57 IDEA 385, 388 (2017).

22. *See* Jacklyn Hoffman, *Crossing Borders in the Digital Market: A Proposal to End Copyright Territoriality and Geo Blocking in the European Union*, 49 GEO. WASH. INT'L L. REV. 143, 145–46 (2016) (explaining why companies find geo-blocking profitable).

23. *See* Brian Galante, *Geo-Fencing, Geo-Blocking*, 23 RADIOWORLD 20, 20–21 (2017) (describing how "geo-fencing" allows geo-blocking services to create virtual locations to discriminate users' locations).

24. *See* Kra-Oz, *supra* note 21, at 388–89.

25. *See* Saverio Cavalcanti, *Antitrust*, 36 LICENSING J. 12, 12–13 (2016) (describing common geo-blocking methods with a focus on the antitrust concerns these practices might raise).

26. *See* James A. Muir & Paul C. van Oorschot, *Internet Geolocation: Evasion and Counterevasion*, 42 ACM COMP. SURVS. 1, 4 (2009) (detailing the process of IP collection from and function within geo-location services). Using a user's IP address lacks geographic precision, although it will generally provide enough information to figure out a person's location. *See id.* Also, it is possible to create false IP addresses to public databases, which are often updated infrequently. *See id.*

27. *See* Arthur Baxter, *VPN: Get Started with Linux*, 218 LINUX FORMAT 78, 78–79 (2016).

28. *See* Zoe Shacklock, *On (Not) Watching Outlander in the United Kingdom*, 17 VISUAL CULTURE BRIT. 311, 318 (2016).

B. *Copyright as a Means to Protect Digital Technology in International Law*

International copyright's history shows that countries have struggled to adapt copyright to the digital age. In this regard, commentators have suggested that copyright is principally for the protection of physical goods and because copyright is rooted in this tradition, it is difficult, and maybe impossible, to attempt to reconcile it with an ever-increasing digital age.[29]

Historically, international countries have sought to harmonize bodies of copyright law to coordinate domestic laws in ways that would benefit all participating countries.[30] The internet presented a host of new issues for content creators; namely, readily accessible and easily disseminated copies of protected works.[31] Before the adoption of the international treaties, international copyright law had focused on physical goods.[32] Attempting to apply physical copyright laws to the internet raised problems, as these laws had not been adapted to examine infringements without the creation of other physical objects.[33] Further, individuals online were notoriously difficult to trace, making it difficult for creators to enforce their rights against individual infringers.[34] This nightmare was compounded by the cross-border, multi-jurisdictional nature of cyberspace itself.[35] Thus, creators would have to rely on traditional methods of IP litigation, while facing the jurisdictional problems raised by the internet. As a result of such a quagmire, the world turned to international legislation, with the hope

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29. *See* John Perry Barlow, *The Economy of Ideas*, WIRED (Mar. 1, 1994, 12:00 PM), https://www.wired.com/1994/03/economy-ideas/ [https://perma.cc/F67M-Y2VK] (archived Jan. 3, 2022).

30. CHRISTOPHE BELLMANN, GRAHAM DUTFIELD, & RICARDO MELENDEZ-ORTIZ, TRADING IN KNOWLEDGE: DEVELOPMENT PERSPECTIVES ON TRIPS, TRADE AND SUSTAINABILITY 90 (2003). Arguably, a critique of these regimes is that the balance of rights tilts toward copyright owners in developed countries. *Id.*

31. *See* Martina Gillen & Gavin Sutter, *DRMS and Anti-Circumvention: Tipping the Scales of the Copyright Bargain?*, 20 INT'L REV. L. COMPUTS. & TECH. 287, 287–88 (2006).

32. *See* MONIKA DOMMANN, AUTHORS AND APPARATUS: A MEDIA HISTORY OF COPYRIGHT 2–5 (2019) (citing examples of commentators struggling with understanding how copyright law can shift from physical objects to new technologies like cable televisions and computers).

33. *See* Barlow, *supra* note 29.

34. *See* Erica D. Klein & Anna K. Robinson, *Combating Online Infringement: Real-World Solutions for an Evolving Digital World*, A.B.A LANDSLIDE (Apr. 1, 2020), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2019-20/march-april/combating-online-infringement-real-world-solutions-evolving-digital-world/ [https://perma.cc/8XPH-L7H2] (archived Jan. 3, 2022) (explaining that with the rampant infringement in the digital age, it can be difficult for owners of intellectual property to enforce their rights online).

35. Gillen & Sutter, *supra* note 31, at 288.

of adapting international copyright law to the internet and harmonizing the scope of international law.[36]

These harmonization efforts culminated in several international treaties. Individual member nations began implementing these treaties to harmonize international copyright law.[37] Harmonization, for all its costs, has been the primary and preferred mechanism for integrating developing countries into the international IP system.[38] However, commentators often point out that harmonization efforts directed toward the internet have been largely unsuccessful outside of the United States and the EU because of the influence the United States and EU exert on international negotiations.[39] Thus, this subpart begins by tracing these harmonization efforts, which eventually culminated in WIPO's treaties.

1. The Berne Convention

One of the first steps in these harmonization efforts centered around the Berne Convention for the Protection of Literary and Artistic Property (Berne Convention).[40] Though amended numerous times since its inception, the Berne Convention generally imposes minimal obligations upon its member states, rather than setting substantive norms.[41] One of the greatest thrusts of the Berne Convention was its principle of national treatment, which requires that each member state accord foreign nationals the same level of copyright protection given to the nation's own citizens.[42] The national treatment provision states:

> Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.[43]

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36. Barlow, *supra* note 29; HAGGART, *supra* note 14, at 17; Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 376 (1997).

37. *See, e.g.*, WCT, *supra* note 15 (treaty establishing international law); *see also* S. REP. NO. 105–90, at 1–2 (1998) (explaining that the bill's purpose as an effort to comply with the WCT).

38. MELENDEZ-ORTIZ, DUTFIELD, & BELLMANN, *supra* note 30, at 90.

39. *See, e.g.*, Antonelli, *supra* note 14, at 148 (illustrating the problem of harmonization, specifically that outside of the United States and the EU, other countries have failed to harmonize international law regulating the internet).

40. *See generally* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as revised at Paris on* July 24, 1971 *and amended in* 1979, S. TREATY DOC. NO. 99-27 (1986) [hereinafter Berne Convention].

41. *See* Antonelli, *supra* note 14, at 148 (noting that because the Berne Convention only imposes obligations upon its members to establish minimal levels of copyright protection, it contributes little to the harmonization of international copyright law).

42. *See* S. REP. NO. 100-352, at 1–5 (1988); *see also id.* at 149 (describing the principle of national treatment).

43. Berne Convention, *supra* note 40, art. 5(1).

For example, a work made by a US national should receive the same minimal protections in other member nations as those nations afford their own citizens.[44] In addition to the national treatment principle, the Berne Convention also sets forth minimum rights that are guaranteed under the laws of member states, such as the rights of reproduction and public performance.[45]

The Berne Convention was, however, ambiguous regarding infringing acts occurring outside of the country where the protection was claimed.[46] One group of commentators suggests that the national treatment provision requires application of the law of the country where the infringement occurred, not the location of the author or the work's first publication.[47] Others contend that the provision means that the scope of a plaintiff's rights are determined by the law of the country where protection is claimed.[48] A third group argues that the national treatment provision merely means that if a country's law of infringement applies to a defendant, the application of that law must apply uniformly to domestic and foreign defendants alike.[49] Most importantly, however, many agree that while the Berne Convention's national treatment rule may have relative ease in the applicability of physical goods, it failed to address how digital technology might impact where infringement occurs, signaling international copyright law's failure to address the needs of a technologically evolving society.[50]

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44. *See* Edward J. Ellis, *National Treatment under the Berne Convention and the Doctrine of Forum Non Conveniens*, 36 IDEA 327, 330–31 (1995) (providing an example of the principle of national treatment for a US national); *see also* Chris Dombkowski, *Simultaneous Internet Publication and the Berne Convention*, 29 SANTA CLARA COMPUT. & HIGH TECH. L. J. 643, 668–71 (2012) (providing an example of how US copyright law might apply in a way which fails the national treatment provision of the Berne Convention).

45. *See, e.g.*, Berne Convention, *supra* note 40, art. 2(2) (giving the power to the legislation of member countries to provide for other categories of works that may be protected by their individual copyright law).

46. *See* Ellis, *supra* note 44, at 331 ("While the Berne Convention specifies that domestic law governs a work's protection in its country of origin, the treaty is less clear as to choice of law for acts of infringement that occur in other nations."). This choice of law issue is briefly described in the next Part but is beyond the scope of this Note.

47. *See, e.g.*, 5 DAVID NIMMER & MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 17.05 (1994).

48. *See, e.g.*, S.M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS § 3.17 (2d ed. 1989).

49. *See* Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82, 89 (2d Cir. 1998) (providing an explanation for this view and noting the previously mentioned approaches by commentators).

50. *See generally* Dombkowski, *supra* note 44 (addressing the problems with the Berne Convention and its failure to address the law of the internet); *see also* Jane C. Ginsburg, *Berne-Forbidden Formalities and Mass Digitization*, 96 B.U. L. REV. 745 (2016) (noting other problems created by the Berne Convention in the context of the internet).

2. A New Focus on the Internet

The Berne Convention's failure to address technology quickly turned harmonization efforts to the internet. At the time, creators were focused on internet piracy and the ability to protect libraries of stored copyrighted content. To protect their copyrighted works, content creators created digital resource management systems (DRMs).[51] DRMs may be defined as technological systems designed to organize and protect digital content, which avoid digital piracy by preventing unauthorized access and managing content usage rights.[52] These systems allowed copyright owners to control access to their works, even to customers who used their products legally.[53]

Because these systems allowed for content creators to provide additional protection to their works, these systems threatened to undermine the balance of rights between copyright holders and enjoyers of copyrighted works.[54] But these measures had obvious appeal to copyright owners, in that they offered protection in a new digital era of copying by allowing a company to create product scarcity and permitting a company to control the downstream of their products. These advantages enabled companies to extend copyright-like protection beyond the temporal limits imposed by copyright law.[55] In a response to these negative aspects of DRMs, customers quickly began using technology to bypass them. This soon became commonplace because regardless of their theoretical benefits and costs, DRMs had a fatal deficiency: they were broken into quite easily.[56] Indeed, it has been said that "it is only a matter of time before any DRMs [are] circumvented."[57]

In response, the focus turned to WIPO, under the auspice of the United Nations (UN), which is responsible for administering various treaties on copyright.[58] Because WIPO's goal is to lead to the

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51. Gillen & Sutter, *supra* note 31, at 288.

52. *See* Jen-Hao Hsiao, Jenq-Haur Wang, Ming-Syan Chen, Chu-Song Chen, & Lee-Feng Chien, *Constructing a Wrapper-Based DRM System for Digital Content Protection in Digital Libraries*, *in* DIGITAL LIBRARIES: IMPLEMENTING STRATEGIES AND SHARING EXPERIENCES 375, 375–76 (Edward A. Fox, Erich J. Neuhold, Pimrumpai Premsmit, & Vilas Wuwongse eds., Springer-Verlag Berlin Heidelberg 2005).

53. *See* HAGGART, *supra* note 14, at 18–21.

54. *See* Mengna Liang, *Copyright Issues Related to Reproduction Rights Arising from Streaming*, 23 J. WORLD INT. PROP. 798, 811–12 (2020) (explaining the liability and problems arising from the use of VPNs to circumvent technological protection measures).

55. *See* CHRISTOPHER MAY, THE WORLD INTELLECTUAL PROPERTY ORGANIZATION: RESURGENCE AND THE DEVELOPMENT AGENDA 66–68 (2007).

56. *See* HAGGART, *supra* note 14, at 19–21.

57. Gillen & Sutter, *supra* note 31, at 288.

58. *See* Sylvia Mercado Kierkegaard, *Outlawing Circumvention of Technological Measures Going Overboard: Hollywood Style*, 22 COMPUT. L. & SEC. REP. 46, 48 (2006); *see also* JEREMY DE BEER, IMPLEMENTING THE WORLD INTELLECTUAL PROPERTY ORGANIZATION'S DEVELOPMENT AGENDA 4 (Jeremy de Beer ed., Wilfrid Laurier Univ. Press 2009).

development of a balanced and effective international IP system that enables creativity and innovation for the benefit of the UN member nations,[59] WIPO is uniquely situated to aggregate the concerns of the varying international interest groups.[60]

3. The International Treaties

The first step in implementing WIPO's international copyright agenda was the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).[61] The TRIPS Agreement established a comprehensive scheme of copyright protection and established the minimum level of copyright protection its members were required to provide (similar to the Berne Convention's national treatment provision).[62] However, though the TRIPS Agreement established the baseline protection for international members, it left many questions unanswered regarding works disseminated on the internet.[63]

As a result of these concerns, in 1996, WIPO implemented a new treaty aimed at the application of copyright in a digital economy: the WIPO Copyright Treaty (WCT).[64] This treaty primarily sought to solve one of the core complaints with the TRIPS Agreement, namely that existing laws regulating the dissemination of physical works were ill-suited to regulate digital works.[65]

The WCT attempted to solve content providers' complaints that users were getting around their DRMs and technological protection measures through its anti-circumvention provision. This anti-circumvention provision was set forth in Article 11:

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59. *See Inside WIPO*, WORLD INTELL. PROP. ORG., https://www.wipo.int/about-wipo/en/ [https://perma.cc/MUQ6-L8VL] (archived Dec. 23, 2021) (WIPO's primary tasks are to develop international IP law, promote IP for economic development, and seek a better international understanding of intellectual property).

60. *See* HAGGART, *supra* note 14, at 72.

61. *See generally* Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299; *see also* WATAL, WAGER, & TAUBMAN, *supra* note 14, at 6–10 (detailing TRIPS and how it functioned as a mechanism for implementing WIPO's international copyright agenda).

62. *See generally* UNITED NATIONS CONF. ON TRADE AND DEV., RESOURCE BOOK ON TRIPS AND DEVELOPMENT (Cambridge Univ. Press 2005) (describing the TRIPs framework).

63. *See* WATAL, WAGER, & TAUBMAN, *supra* note 14, at 38–39; *see also* Neil W. Netanel, *The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement*, 37 VA. J. INT'L L. 441, 441–43 (1997).

64. *See generally* WCT, *supra* note 15 (detailing the WCT); MELENDEZ-ORTIZ, DUTFIELD, & BELLMANN, *supra* note 30, at 89–90. *See also* Gillen & Sutter, *supra* note 31, at 289. The WIPO Performances and Phonograms Treaty (WPPT) was also adopted but is beyond the scope of this Note. *See generally* WIPO Performances and Phonograms Treaty, *adopted* Dec. 20, 1996, S. TREATY DOC. NO. 105-17 (1997) (detailing the WCT).

65. *See* HAGGART, *supra* note 14, at 17.

Obligations Concerning Technological Measures

> Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.[66]

Importantly, this provision was left ambiguous as to whether the act of circumvention itself was unlawful or if there also needed to be a connection to an infringement of a member country's own copyright law.[67] The ambiguity of the provision was purposeful and sought to allow leeway for countries to select their own level of protection, because, as will be discussed, this particular provision of the treaty proved to be controversial during treaty discussions. One might have expected that a treaty allowing individual countries to customize their own law would be received positively. This was not the case, and the treaty was met with contention.[68] Part of this pushback resulted from the strong influence of the United States and the EU on the WCT's development.[69]

C. *The US and EU Influence on the WCT*

The United States and the EU both played pivotal roles in shaping the WCT's anti-circumvention provision. Both of these entities had engaged WIPO for many years before their efforts culminated in the WCT. The United States was responsible for the pressure to create strong rights for copyright holders, as it strongly pushed an agenda that was highly deferential to content creators.[70] The European Commission (EC) influenced the adoption of the treaties through its Green Paper on Copyright and the Challenge of Technology[71] (Green Paper). Indeed, the Green Paper had formed the basis for and framed the issues discussed during the formation of the treaties.[72]

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66. WCT, *supra* note 15, art. 11. The WPPT contains a similar provision in article 18, but this provision is only applicable to phonograms.

67. *See generally* JORG REINBOTHE & SILKE VON LEWINSKI, THE WIPO TREATIES ON COPYRIGHT (2d ed. 2015) (describing the ambiguity in the provision and how it left room for countries to adopt their own substantive standards).

68. *See id.* at 166–68 (noting that article 11 received contentious discussion and division at the diplomatic conferences).

69. *See* Netanel, *supra* note 63, at 443; *see also* Samuelson, *supra* note 36, at 371.

70. *See* Samuelson, *supra* note 36, at 378.

71. European Commission, *Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action*, COM (1988) 172 final (June 7, 1988) [hereinafter *Green Paper*].

72. *See* Samuelson, *supra* note 36, at 376.

1. The United States and the WIPO Conferences

The story of the United States' involvement in the WCT begins during the administration of Bill Clinton. In 1993, Bill Clinton created the Information Infrastructure Taskforce, with a special working group whose primary goal was to formulate US copyright policy for the internet age.[73] Headed by Bruce Lehman, the main US representative to WIPO, the working group began to negotiate with WIPO, seeking to reform national law and develop the WIPO treaties.[74] Lehman was instrumental in shaping the United States' copyright policy and in negotiating on behalf of the United States at the WIPO conferences.

In 1995, the working group produced the infamous "White Paper,"[75] which set forth the United States' position on the digital economy. This paper was deferential to content creators, and in the context of technological protection measures, it argued for liability that extended to the act of circumvention itself, rather than be connected to any act of infringement.[76] This is because the White Paper emphasized that it was the devices or products themselves that circumvented a technological protection measure.[77] The White Paper reasoned that preventing users from circumventing technological protection measures was as necessary as the other exclusive rights already provided by existing US copyright law.[78] This was a result of Lehman's own preference to favor the rights of content creators instead of users. Backlash resulted from the White Paper's chosen positions, as many interest groups complained that the White Paper's recommendations were too deferential to content creators.[79]

The White Paper's recommendations immediately faced a seemingly insurmountable hurdle: the US Congress. Introduced as the NII Copyright Protection Act of 1995,[80] it faced fierce opposition, which caused it to stall in the House Judiciary Committee.[81] This pushback showed Congress's dislike for how deferential the recommendations

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73. *See* Timothy K. Armstrong, *Fair Circumvention*, 74 BROOK. L. REV. 1, 5 (2008) (describing the backdrop to the WIPO conferences).

74. *See* Graeme Dinwoodie, *The WIPO Copyright Treaty: A Transition to the Future of International Copyright Lawmaking*, 57 CASE W. RSRV. L. REV. 751, 755 (2007) (describing the working group and the issues it sought to discuss at the WIPO conferences).

75. *See generally* INFO. INFRASTRUCTURE TASKFORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995) (detailing the famous "White Paper").

76. *See id.* at 230–32.

77. *See* HAGGART, *supra* note 14, at 111–12.

78. *See* HAGGART, *supra* note 14, at 111–12.

79. *See, e.g.*, JESSICA LITMAN, DIGITAL COPYRIGHT 122–30 (2001) (noting these criticisms).

80. NII Copyright Protection Act of 1995, S. 1284, 104th Cong. (1995).

81. HAGGART, *supra* note 14, at 112. This stalling signaled a common problem in US copyright law. *Id.* at 113.

were to content creators. Lehman, not to be deterred, decided to go straight for WIPO.[82] Lehman then pushed his content-creator-friendly agenda on WIPO, despite that it was the strong deference to content creators that had caused Congress to initially reject the bill.[83]

Then came the conferences: set in Geneva, the WCT diplomatic conferences would prove to be the largest ever for copyright and related issues.[84] Emblematic of Lehman's influence on WIPO, the original draft of WCT Article 11 was drafted almost verbatim from the White Paper.[85] But, as a result of pushback from other countries, the final draft of Article 11 proved far more permissive than the original draft. Specifically, Article 11 made no mention of devices, focusing only on the act of circumvention itself.[86]

2. The EU's Influence on the WIPO Treaties

As mentioned above, the EC's Green Paper can be credited with formulating the issues to be addressed by the WIPO treaties.[87] The Green Paper outlined the Commission's goals regarding a new intellectual property regime. The EC sought to create a coherent framework for regulations at the national, regional, and international levels. In enacting its goals, the Green Paper acknowledged that laws would have to be adapted and created to respond to the new requirements of the digital era.[88]

The Green Paper focused on a wide array of intellectual property issues and considered how an information society ought to function.[89] In an era of increasingly digital works combined with laws that favored primarily physical goods, the EC sought to create rules that would create a free movement of goods between each of its member countries.[90] Additionally, there was a strong concern that goods would

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82. *See* LITMAN, *supra* note 79, at 122–30 (describing Lehman's journey to reach the WIPO).

83. *See* Calvin Reid, *Battle Continues over Digital Copyright Proposals*, 243 PUBLISHER'S WKLY. (1996) (explaining the U.S. Delegation pushed the same proposals at the Geneva Convention as had failed in the initial NII Copyright Protection Act).

84. MIHALY FICSOR, THE LAW OF COPYRIGHT AND THE INTERNET 44–45 (2002) (explaining the complexity and number of the issues set to be discussed at the conferences).

85. *See* Pamela Samuelson, *The Copyright Grab*, WIRED (Jan. 1, 1996, 12:00 PM), https://www.wired.com/1996/01/white-paper/ [https://perma.cc/KJE9-EJ3L] (archived Dec. 31, 2021) (showing that Lehman had been urging for WIPO to adopt the standards articulated in the White Paper).

86. *See* REINBOTHE & VON LEWINSKI, *supra* note 67, at 164–67.

87. *See* Samuelson, *supra* note 36, at 376.

88. *Green Paper*, *supra* note 71.

89. *See* Guibault, Westkamp, & Rieber-Mohn, *supra* note 17, at 2.

90. *See* COPYRIGHT IN THE INFORMATION SOCIETY: A GUIDE TO NATIONAL IMPLEMENTATION OF THE EUROPEAN DIRECTIVE 40–41 (Brigitte Lindner & Ted Shapiro eds., 2d. ed., 2019) (explaining that the EU was focused on creating a single digital market for its member states).

circulate in non-material form, and so the focus was on services, rather than freedom of the goods themselves.[91] The EC emphasized primarily economic concerns, like the incentive to invest in the development of new creative works and activities.[92] The Green Paper identified many copyright issues and specifically sought to harmonize the right of reproduction and communication to the public.[93] It also saw the need to preserve technological systems that protected copyrighted works. The Green Paper ultimately determined that new international copyright legislation was needed.[94]

After the Green Paper was published, concerns were raised about the fast technological developments occurring at that time. It may have been unclear what the impact of these developments would be, but the EC nonetheless recognized that a regulatory framework was necessary and currently lacking.[95] However, the Commission also recognized that the cost of such a framework would be large and therefore set its sights on the international community.

After the Green Paper, the EU joined the United States at the WIPO conferences, realizing a new goal in its quest to prevent piracy: harmonizing international copyright law.[96] The EU submissions, adopted mostly from the Green Paper, differed from the US position. The EU sought a knowledge requirement that required an infringer to know, or have reasonable grounds to know, of the circumventing

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91. *See* Jim Ford, *Harmonisation Without the Harmony: Six Years on from its 1995 Green Paper and Vociferous Lobbying in the Meantime, is Anyone Happy with the EU Copyright Directive?*, MUSIC WEEK (Sept. 29, 2001) (explaining that the Green Paper understood that it would be difficult to directly adapt the old copyright law's focus on physical goods to the internet).

92. Guibault, Westkamp, & Rieber-Mohn, *supra* note 17, at 3. The EU has continued these efforts by adopting another proposal aimed at, amongst other objectives, economic utility. *See generally* Natalia E. Curto, *EU Directive On Copyright in the Digital Single Market and ISP Liability: What's Next at the International Level?*, CASE W. RSRV. J.L. TECH. & INTERNET 84 (2020).

93. *See* MIREILLE VAN EECHOUD, P. BERNT HUGENHOLTZ, STEF VAN GOMPEL, LUCIE GUIBAULT, & NATALIE HELBERGER, HARMONIZING EUROPEAN COPYRIGHT LAW: THE CHALLENGES OF BETTER LAWMAKING 5–7 (2009) (listing the purposes of the Green Paper and its goals of harmonizing EU copyright law and its emphasis on a single digital market, focusing on the internet).

94. ANDREA RENDA, FELICE SIMONELLI, GIUSEPPE MAZZIOTTI, ALBERTO BOLOGNINI, & GIACOMO LUCHETTA, CTR. FOR EUR. POL'Y STUD., THE IMPLEMENTATION, APPLICATION AND EFFECTS OF THE EU DIRECTIVE ON COPYRIGHT IN THE INFORMATION SOCIETY 16–18 (2015) (describing the legal basis for the EU's legislation of copyright as being a measure which effectuates the creation of a single market); *see also* Thomas Dreier, *Copyright in the Times of the Internet—Overcoming the Principle of Territoriality within the EU*, ERA FORUM (2017) (discussing territoriality issues in the EU and why the varying standards per country make unifying standards across member states difficult).

95. *See* Guibault, Westkamp, & Rieber-Mohn, *supra* note 17, at 3.

96. *See* VAN EECHOUD, HUGENHOLTZ, VAN GOMPEL, GUIBAULT, & HELBERGER, *supra* note 93, at 5–7.

purpose of his or her actions.[97] Ultimately, however, pressure from other countries caused the knowledge requirement to be removed, leaving the final provision more in line with the United States' initial submissions.[98]

D. *Understanding the Criticisms of the WCT*

The WCT has received numerous critiques from various interest groups and its own member countries. The anti-circumvention provision was intended to leave room for individual countries to experiment with different anti-circumvention methods, but the WCT faced criticism precisely because of this ambiguity.[99]

Many interest groups levied criticisms focused on ambiguity in the language of the WCT, noting that the terms "adequate" and "effective" have no definition in the treaty itself.[100] They also pointed out that the provision seeks to ban the act of circumvention itself, which they felt exceeded the scope of what should be protected by copyright.[101] This reading arguably aligns with the language the United States pushed, which sought to focus on devices and the circumventing act to establish a right similar to the other exclusive rights present in international copyright law. However, because the device language was excluded from the ultimate treaty, Article 11 proved broader than the interpretation favored by the United States. Indeed, a 2003 study noted that Article 11's language suggests it should be interpretated to focus only on the act of circumvention itself, not on the device by which the circumvention is done through.[102] Further, this provision differed from the EU position, as there was no knowledge requirement in the treaty language.

That said, a benefit of this ambiguity is that the WCT allows a country to adopt either the United States' or the EU's chosen positions.[103] As the treaty lacks an enforcement mechanism, the treaty provides no penalty for a state's choice of which position to adopt. However, the freedom of choice within the treaty, being a result of the highly contentious nature of the treaty negotiation, harms the treaty's goal of harmonization.

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97. *See* REINBOTHE & VON LEWINSKI, *supra* note 67, at 166–67.

98. *See id.* at 166–68.

99. *See* Netanel, *supra* note 63, at 443.

100. *E.g.*, Ian Brown, *The Evolution of Anti-Circumvention Law*, 20 INT'L REV. L. COMPUTS. & TECHS. 239, 243 (2006); HAGGART, *supra* note 14, at 18, 120–21.

101. *E.g.*, Brown, *supra* note 100, at 243.

102. World Intell. Prop. Org. [WIPO], *Current Developments in the Field of Digital Rights Management*, at 46, WIPO Doc. SCCR/10/2/Rev (May 4, 2004), https://www.wipo.int/edocs/mdocs/copyright/en/sccr_10/sccr_10_2_rev.pdf [https://perma.cc/UK3L-NJWQ] (archived Dec. 31, 2021).

103. HAGGART, *supra* note 14, at 129.

The WCT has also faced criticism from many of its member countries based on its deference to content creators. To that end, many developing countries dislike the strong policy toward IP protection WIPO envisions, believing that WIPO has marginalized their interests.[104] For example, during treaty discussions, South Africa was concerned that the US position was too connected to the private sector and submitted proposals intending to connect the act of circumvention more clearly to an author's exclusive rights.[105] Other developing countries offered to support South Africa's position,[106] but they ultimately acquiesced and accepted the WCT's final language—the same ambiguous language that these countries would later cite when complaining of the treaty's lack of specificity.

These criticisms aside, there are two schools of thought as to what the anti-circumvention provision means: (1) the circumvention of any technological measure is sufficient to violate the treaty provision or (2) the only circumventions prohibited by the treaty are those that are linked to copyright infringement.[107] Importantly, as will be seen later, the United States' Circuit Courts and the EU's member states have simultaneously adopted *both* of these interpretations within their respective jurisdictions. In other words, the US Circuit Courts and the EU member states have both split amongst themselves along the same lines as these two interpretations. Whether a jurisdiction chooses one of the two interpretations is dependent on if the jurisdiction views anti-circumvention as a distinct right or as a way of strengthening infringement rights.

III. THE US AND EU IMPLEMENTATION OF THE WIPO TREATIES

History would prove Lehman's battle with Congress in the early 1990s as the hardest part of the war. Though many members of Congress had originally expressed their displeasure at Lehman's attempts to evade the US legislative process, the bill proposed to domestically implement the WCT passed Congress relatively unscathed.[108] This bill, enacted as the DMCA, put pressure on the EU to enact its version of the WCT in 2001. The EU's directive, known as the Information Society Directive, contained language similar to the DMCA. Because the DMCA's adoption pressured the EU to enact the Information Society Directive, this Part begins with the adoption of the DMCA before turning to the Information Society Directive.

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104. DE BEER, *supra* note 58, at 4.

105. REINBOTHE & VON LEWINSKI, *supra* note 67, at 166–68.

106. *See id.*

107. HAGGART, *supra* note 14, at 120–21.

108. For a more detailed comparison between the White Paper and the DMCA Bill, see HECTOR POSTIGO, THE DIGITAL RIGHTS MOVEMENT: THE ROLE OF TECHNOLOGY IN SUBVERTING DIGITAL COPYRIGHT 41–59 (2012).

A. *The Digital Millennium Copyright Act*

To comply with the WCT, the United States enacted the Digital Millennium Copyright Act of 1998.[109] Specifically, Title I of the DMCA was enacted to bring US copyright law in line with the WCT's obligations.[110] With the DMCA's enactment, the United States acknowledged that the WCT shifted the burden to the individual legislatures to adopt anti-circumvention measures permitted by the WCT language.[111] Additionally, the committee reports suggest an understanding that the WCT obligated its member states to provide the same protection to foreign works as they granted to domestic works.[112]

Many legislators originally thought that a bill like the DMCA would not even have been necessary to comply with the WCT.[113] However, the authors of the DMCA recognized that Article 11 of the WCT created an obligation to provide "legal protection and effective legal remedies" for technological measures, like encryption and password protection, commonly used by copyright owners to protect their works.[114] To fulfill this obligation, the DMCA sought to provide legal ramifications for circumvention and for providing services that are aimed at circumventing technological measures.[115] To describe the type of conduct the proposed statute targeted, the authors of the bill offered the following as an example:

> [I]f unauthorized access to a copyrighted work is effectively prevented through use of a password, it would be a violation of this section to 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.[116]

The legislative history of the bill claims that the provision bans circumvention of a technological measure that "effectively controls access to a work subject to copyright, regardless of whether or not such access would itself amount to an infringement."[117] Indeed, the chair of the House Commerce Committee boldly proclaimed that the anti-circumvention provision of 17 U.S.C. § 1201(a) (alongside the other

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109. Digital Millennium Copyright Act, Pub.L. 105-304, 112 Stat. 2860 (1998).
110. S. REP. NO. 105-190, at 1–2.
111. *Id.* at 5.
112. *Id.* at 10.
113. HAGGART, *supra* note 14, at 132.
114. *See* S. REP. NO. 105-190, at 10 (1998).
115. *See id.* at 11.
116. *Id.* (footnote omitted).
117. HAGGART, *supra* note 14, at 133.

anti-circumvention provisions of the DMCA) would "create entirely new rights for content providers that are wholly divorced from copyright law."[118]

How the DMCA's anti-circumvention provision has played out in US courts, however, is not as clear as the chair's confident assertion. To understand how the DMCA has been interpreted by the US courts, this subpart begins with the plain language of the DMCA before turning to the US circuit courts' jurisprudence.

1. The Language of the DMCA

Under the anti-circumvention provision of the DMCA, it is unlawful for a person to circumvent a technological measure that effectively controls access to a work protected by copyright law.[119] At first glance, one would think that using a VPN to stream another country's content would be covered by this provision. Copyright law protects audiovisual works, defining them as works consisting of a series of related images and their accompanying sounds that are intrinsically intended to be shown by the use of machines.[120] A user circumvents a technological measure where the user avoids, bypasses, removes, deactivates, or impairs a technological method without the authority of the author of the copyright owner.[121] A technological measure effectively controls access to a work where it, in the ordinary course of operation, requires the application of information, or process or treatment, with the authority of the copyright owner, to gain access to the work.[122]

Thus, the combination of these subsections suggests that the use of VPN software to watch Netflix and other streaming programs would be a circumvention of an effective technological measure. But some US courts, namely the Federal Circuit, have read an additional requirement into the provision: that the act circumventing an effective

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118. *Id.* This statement alludes to multiple anti-circumvention provisions, but this Note specifically focuses on 17 U.S.C. § 1201(a). Therefore, when this Note refers to the DMCA's anti-circumvention provision, it refers to section 1201(a) and its accompanying subsections.

119. *See* 17 U.S.C. § 1201(a)(1)(A) (1999); Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522, 545 (6th Cir. 2004).

120. *See* 17 U.S.C. §§ 101, 102(a)(6).

121. 17 U.S.C. § 1201(b)(2)(A); *see* Disney Enters., Inc. v. VidAngel, Inc., 869 F.3d 848, 865 (9th Cir. 2017) (explaining that nothing in the legislative history of section 1201 suggests that someone did not circumvent an access control merely because there were authorized ways to access the work).

122. 17 U.S.C. § 1201(b)(2)(B); *see Lexmark Int'l, Inc.*, 387 F.3d at 545 (explaining that effectively controlling access to a work does not include technological measures that restrict one form of access but leave another route wide open).

technological measure must be connected to an act of infringement.[123] This interpretation mirrors a permissible view of the WIPO treaty according to the WCT's authors—though not a view envisioned by the writers of the DMCA.[124]

2. The Federal Circuit and the Nexus Requirement

The Federal Circuit has held that the DMCA requires a nexus between access and copyright protection.[125] In essence, a copyright owner alleging a violation of section 1201(a) must prove that circumvention of the technological measure either "infringes or facilitates infringing a right protected by the copyright act."[126] In *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, the Federal Circuit explained that when Congress enacted the DMCA, rather than create a new property right, it "chose to create new *causes of action* for circumvention" and that section 1201 prohibits only forms of access that bear a reasonable relationship to the other protections of the copyright statute.[127]

Following this decision, in *Storage Technology Corporation v. Custom Hardware Engineering & Consulting, Inc.*, the Federal Circuit applied this test where a device was used that bypassed a technological protection measure and caused a copy of copyright-protected software to download onto a computer's random-access memory (RAM).[128] The court held this conduct was not actionable under the anti-circumvention provision of the DMCA because even if the plaintiff "were able to prove that the automatic copying of the software into RAM constituted copyright infringement . . . it would still have to show that the [defendant] facilitated that infringement."[129] It summarized, "[t]here is simply not a sufficient nexus between the rights protected by copyright law and the circumvention of the" technology.[130]

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123. *E.g.*, MDY Indus., LLC v. Blizzard Ent., Inc., 629 F.3d 928, 948 (9th Cir. 2010); *see also* Marketa Trimble, *The Future of Cybertravel: Legal Implications of the Evasion of Geolocation*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 567, 616–17 (2012) (citing examples).

124. *See* HAGGART, *supra* note 14, at 133 (questioning whether certain congressmen accurately discerned the WCT's author's intent in enacting the treaty provision); Trimble, *supra* note 123, at 616–17 (describing the application of the treaty and juxtaposing the DMCA against that application).

125. *See* Chamberlain Grp., Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1195–96 (Fed. Cir. 2004); Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc., 421 F.3d 1307, 1318 (Fed. Cir. 2005)

126. *Storage Tech. Corp.*, 421 F.3d at 1318 (quoting *Chamberlain Grp., Inc.*, 381 F.3d at 1203).

127. *Id.* (emphasis added). The court also noted that the "structure" of the statute creates a distinction between property and liability but fails to fully explain this point. *Id.*

128. *See id.* at 1319.

129. *Id.*

130. *Id.*

Thus, under this nexus test, a copyright owner will have to prove a connection between the act of circumvention and infringement of one of the exclusive rights under section 106 of title 17 of the U.S. Code.[131] Relevant to streaming movies online, the exclusive rights that apply are the exclusive rights to reproduce the copyrighted work in copies, to perform the work publicly, and to display the work publicly.[132] Notably, no circuit has squarely addressed whether an individual who merely streams a video over the internet is liable for copyright infringement.

The clearest exclusive right that streaming implicates is the right of reproduction because when a user streams a Netflix show on his or her computer, the computer replicates small parts of the video at a time to the computer through its RAM.[133] Under section 106 of title 17 of the U.S. Code, the author of a copyright has the exclusive right to reproduce his or her work in copies.[134] A copy is an object in which a work is fixed and from which the work may be perceived with the aid of a machine, for more than a transitory duration.[135]

The reproductive right, however, raises two distinct problems. First, no US circuit court has addressed whether streaming to a home computer constitutes an infringement of the reproductive right. In *Mai Systems*, the Ninth Circuit held the storage of information on a computer's RAM was an act of "copying" under the US copyright statute.[136] However, the decision acknowledged that not all acts of storing information on RAM would be prohibited under US copyright.[137] This decision has also not received widespread acceptance across the circuits and has been limited to software by one.[138]

Second, and more importantly—assuming for a moment that the storage on RAM is a "copy"—the making of a copy in the United Kingdom, despite being from an American server, has been construed to be an extraterritorial infringement, which fails to state a claim

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131. *See id.*

132. *See* 17 U.S.C. § 106(1)–(5) (listing exclusive rights to copyright).

133. *See generally* Nick Davis, *How Much Memory Does it Take to Stream Netflix*, ITSTILLWORKS, https://itstillworks.com/much-memory-stream-netflix-18178.html (last visited Dec. 22, 2021) [https://perma.cc/G9DJ-PHNE] (archived Dec. 22, 2021) (describing the process of how streaming uses one's computer memory).

134. *See* 17 U.S.C. § 106(1).

135. *See* 17 U.S.C. § 101.

136. MAI Sys. Corp. v. Peak Comput., Inc., 991 F.2d 511, 518 (9th Cir. 1993).

137. *See id.* at 519.

138. For example, in the Federal Circuit, the court in *Storage Technologies Corp.* assumed that it was an infringement, even though it did not hold so. Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc., 421 F.3d 1307, 1319 (Fed. Cir. 2005); *see also* Ticketmaster L.L.C. v. Prestige Ent., Inc., 306 F. Supp. 3d 1164, 1172 (C.D. Cal. 2018) (emphasizing that *MAI Systems* has limited applicability outside of software, and distinguishing viewing webpages, despite that information is placed on RAM); *cf.* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1161 (9th Cir. 2007) (explaining that Google does not "copy" images it shows on google by merely linking the images to a user's computer screen).

under US copyright law. US copyright law does not apply extraterritorially, and the conduct that is prohibited by the act must occur domestically.[139] For the reproductive right, the prohibited act is the copying itself, and courts specifically examine the location where the information is downloaded.[140] For example, in *IMAPizza, LLC v. Pizza Limited*, the Federal Circuit held that downloads that occurred in the United Kingdom were not an act of domestic infringement under US copyright law.[141] Thus, even if it is true that the streaming of a video creates a "copy" of the work by storing information on a computer's RAM, the infringing act (i.e., copying) was done in a foreign country. Under the Federal Circuit's view then, any foreign defendant may circumvent technological measures through US servers without facing liability under section 1201, since the "copying" occurs in another country and there can be no nexus to infringement.[142]

The other exclusive rights in section 106 offer no recourse for copyright owners seeking to protect their content from overseas usage; specifically, the right to make derivative works, the right to distribute, the right to publicly display a work, and the right to perform a work publicly.[143] There is no derivative work produced to implicate the right

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139. *See* Tire Eng'g & Distrib., L.L.C v. Shandong Linglong Rubber Co., 682 F.3d 292, 306 (4th Cir. 2012) (per curiam); Subafilms, Ltd. v. MGM–Pathe Commc'ns Co., 24 F.3d 1088, 1094 (9th Cir. 1994); Spanski Enters., Inc. v. Telewizja Polska, S.A., 883 F.3d 904, 913 (D.C. Cir. 2018); RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016).

140. *See* IMAPizza, L.L.C v. At Pizza Ltd., 965 F.3d 871, 877 (D.C. Cir. 2020); *cf. Spanski Enters., Inc.*, 883 F.3d at 914; Allarcom Pay Television, Ltd. v. Gen. Instrument Corp., 69 F.3d 381, 387 (9th Cir. 1995) (explaining there is no applicability of US copyright where there is no domestically completed act of infringement). However, the second circuit has cast doubt on *Allarcom* and held that when analyzing infringement under the public display and performances right, the public performance or display includes "each step in the process by which a protected work makes its way to the audience." Nat'l Football League v. PrimeTime 24 Joint Venture, 211 F.3d 10, 12 (2d Cir. 2000) (quoting David v. Showtime/The Movie Channel, Inc., 697 F.Supp. 752, 759 (S.D.N.Y.1988)) (rejecting *Allarcom* and finding liability under US law where part of the infringing act occurred in the United States). Under the Second Circuit's rationale, it might be argued that a step in the process of making a copy would be accessing the server in the United States which contains the infringing material. *See* Jane C. Ginsburg, *Extraterritoriality and Multiterritoriality in Copyright Infringement*, 37 VA. J. INT'L L. 587, 598 (1997) (criticizing *Allarcom* because its decision turns on whether a copy was made in the United States only).

141. *IMAPizza, L.L.C.*, 965 F.3d at 877.

142. This begs the question of whether the usage of a server is enough for US law to apply. The answer seems to be yes, because the statute's prohibited conduct is expressly the circumvention itself, occurring on a US server, irrespective of the fact the viewing or downloading occurred in a different country. *See RJR Nabisco, Inc.*, 136 S. Ct. at 2101 (2016) ("If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.").

143. *See* 17 U.S.C. § 106 (listing the exclusive rights to copyright).

to create derivative works.[144] There is no infringement of the distribution right because infringing the distribution right plainly requires the infringer to distribute a "copy" of the work—which raises the problems identified in the reproductive right.[145] Finally, there is no public display or performance violation where an alleged infringer only views or displays the content to themselves.[146] In sum, so long as the person streams the content in his or her own home, the viewing of the copyrighted material is not an infringement of the copyright holder's section 106 rights.[147]

3. The Circuits without a Nexus Requirement

Several circuits have instead flatly rejected the nexus requirement.[148] In *MDY Industries v. Blizzard Entertainment*, for example, the Ninth Circuit declined to adopt a nexus requirement, criticizing the *Chamberlain* court for disregarding the plain text of the statute, reasoning that Congress intended to create a new right of anti-circumvention because:

> (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

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144. *See* Quality King Distribs., Inc. v. L'anza Rsch. Int'l, Inc., 523 U.S. 135, 138 (1998); 17 U.S.C. § 101 ("A 'derivative work' is a work based upon one or more preexisting works."). As the right to prevent the reproduction of a work exists, a derivative work must be something more than an online copy of the work. *See generally* Gracen v. Bradford Exch., 698 F.2d 300 (7th Cir. 1983) (walking through the analysis of an infringement of the right to prepare derivative works).

145. *See* 17 U.S.C. § 106(3).

146. *See* 17 U.S.C. § 106(4)–(5). A single user who watches a video in their own home does not do so "publicly" under the meaning of the copyright statute. *See* Am. Broad. Cos., Inc. v. Aereo, Inc., 573 U.S. 431, 448 (2014) (explaining the Copyright Act "suggests that 'the public' consists of a large group of people outside of a family and friends."). *See generally* Dallas T. Bullard, *The Revolution Was Not Televised: Examining Copyright Doctrine After* Aereo, 30 BERKELEY TECH. L.J. 899 (2015) (explaining the holding and court's interpretation after *Aereo*).

147. Aaron Lerman, *Remnants of Net Neutrality: Policing Unlawful Content Through Broadband Providers*, 12 BROOK. J. CORP. FIN. & COM. L. 363, 375 (2018); Disney Enters., Inc. v. VidAngel, Inc., 869 F.3d 848, 864 (9th Cir. 2017). *See generally* Jan André BlackBurn-Cabrera, *Streaming Movies Online: The e! True Hollywood Story*, 5 U. PUERTO RICO BUS. L.J. 59, 69 (2014) (explaining the liability for streaming movies online); Brianna K. Loder, *Public Performance? How Let's Plays and Livestreams May Be Escaping the Reach of Traditional Copyright Law*, 15 WASH. J.L. TECH. & ARTS 74 (2020) (explaining the liability for livestreaming copyrighted content online).

148. *E.g.*, MDY Indus., L.L.C. v. Blizzard Ent., Inc., 629 F.3d 928, 948 (9th Cir. 2010); Universal City Studios, Inc. v. Corley, 273 F.3d 429, 443 (2d Cir. 2001); MGE UPS Sys., Inc. v. GE Consumer & Indus., Inc., 622 F.3d 361, 366 (5th Cir. 2010); United States v. Reichert, 747 F.3d 445, 448 (6th Cir. 2014); *see* Trimble, *supra* note 123, at 616–17 (citing examples). *See generally* Jennifer Miller, *The Battle over Bots: Anti-Circumvention, the DMCA, and Cheating at World of Warcraft*, 80 UNIV. CIN. L. REV. 653 (2011) (comparing US circuit court's interpretations of the anti-circumvention provision).

> 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.[149]

The Ninth Circuit further explained that its "recognition that § 1201(a) creates a new anti-circumvention right distinct from the traditional exclusive rights . . . does not limit the traditional framework of exclusive rights created by § 106, or defenses to those rights such as fair use."

Thus, rather than a nexus requirement, the prohibited conduct that the statute prevents is the circumventing act itself, whether or not subsequent use would be an infringement. The Fifth and Second Circuits adopted a similar approach, reasoning that the anti-circumvention provision specifically targeted the circumvention itself, not the use of a copyrighted work after the technological measure had been circumvented.[150] For example, in *MGE UPS Systems, Inc. v. GE Consumer and Industries, Inc.*, the Fifth Circuit declined to adopt a broad reading of the anti-circumvention provision, holding that the provision does not include any actions occurring after the technology was circumvented.[151] In the court's view, such a broad construction would extend the DMCA beyond its intended purpose and reach conduct that is already protected by existing copyright laws.[152]

This circuit split illustrates the two theories of the anti-circumvention right, with the Federal Circuit aligning itself with the theory that the circumvention right is an ancillary of infringement, and the Ninth Circuit aligning itself with the theory that anti-circumvention is a right in and of itself.

B. *EU Approach: Adoption of the Information Society Directive*

The EU's fight to enact portions of the WIPO treaties was far more contentious than the United States' fight to enact the DMCA. Indeed, the "unprecedented lobbying, the bloodshed, the vilification, the media propaganda, the constant hounding of EC and government officials," reflected the compromises required in balancing the interests of the EU's various members.[153] Many of these issues resulted from intense pressures from the United States, which had recently enacted the DMCA.[154]

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149. *MDY Indus., L.L.C.*, 629 F.3d at 948.

150. *See MGE UPS Sys., Inc.*, 622 F.3d at 366; *Corley*, 273 F.3d at 441.

151. *MGE UPS Sys., Inc.*, 622 F.3d at 366.

152. *Id.*

153. Bernt Hugenholtz, *Why the Copyright Directive is Unimportant, and Possibly Invalid*, 11 EIPR 499, 499 (2000); *see* Brown, *supra* note 100, at 247–49 (describing the contentious nature of the Information Society Directive).

154. Brown, *supra* note 100, at 247.

Adopted in 2001, the Information Society Directive[155] was the EU's attempt to implement the WIPO treaties.[156] The Information Society Directive had two objectives: (1) adapt legislation on copyright to reflect technological developments and (2) transpose into EU law the main international obligations arising out of the WIPO treaties.[157]

The Information Society Directive was the result of many years of discussion and drafting, beginning in 1995 with the publication of the Green Paper.[158] For years, the EC had been focused on creating a single digital market, but the Green Paper marked a shift from this policy.[159] Throughout the Green Paper's recitals, the Commission emphasized its desire to create high levels of protection for intellectual property, reasoning that a high level of protection would foster substantial investment in creativity and innovation. As a result, its proposal would "lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology, and more generally across a wide range of industrial and cultural sectors."[160] Despite the Green Paper's well-wishes, the EC struggled to craft language that accounted for the interests of all its member states.

As described above, one of the most controversial issues in the Informational Society Directive was enacting the WCT's anti-circumvention provision.[161] Originally, the Green Paper sought to obligate manufacturers to provide protection for technological measures, but the Information Society Directive focused on the act of circumvention itself.[162] This shift was the result of rights holders' efforts to strengthen legal protections for their technological measures.

As a result of the competing interests between member states and the vagueness of Article 11, the Information Society Directive was mired by complexity and dissatisfaction. Indeed, the Information Society Directive has been criticized as suffering from the same

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155. Council Directive 2001/29, 2001 O.J. (L 167) 10 (EC).

156. *See* JOHN DICKIE, INTERNET AND ELECTRONIC COMMERCE LAW IN THE EUROPEAN UNION 99 (Michael Taggart ed., 1999) (describing the timeline of the adoption of the Information Society Directive).

157. Lucie Guibault, *Evaluating Directive 2001/29/EC in the Light of the Digital Public Domain*, *in* THE DIGITAL PUBLIC DOMAIN 61, 61 (Melanie Dulong de Rosnay & Juan Carlos De Martin eds., 2012).

158. *Green Paper*, *supra* note 71; *see* Guibault, Westkamp, & Rieber-Mohn, *supra* note 17, at viii.

159. *See* VAN EECHOUD, HUGENHOLTZ, VAN GOMPEL, GUIBAULT, & HELBERGER, *supra* note 93, at 5–7.

160 Guibault, Westkamp, & Rieber-Mohn, *supra* note 17, at 4.

161. *See* IAN BROWN, FOUND. FOR INFO. POL'Y RSCH., IMPLEMENTING THE EU COPYRIGHT DIRECTIVE 16 (2003) [hereinafter IMPLEMENTING THE EU COPYRIGHT DIRECTIVE] (noting that article 6 of the Information Society Directive was the most controversial part of the Information Society Directive).

162. *See* REINBOTHE & VON LEWINSKI, *supra* note 67, at 166–67 (describing the EU submissions at the WCT conference as being focused on the act of circumvention itself).

imprecision and ambiguity plaguing Article 11 itself.[163] To illustrate the capricious history of the Information Society Directive, the proposal for the Information Society Directive originally stated that the circumvention itself was not sufficient for liability, whereas the final rule had removed this limitation.[164]

In its final, enacted form, Article 6(1) of the Information Society Directive requires member states to "provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective."[165] The Information Society Directive requires member countries to protect technological measures that contain works or subject matter protected by "copyright or any right related to copyright."[166]

The Information Society Directive departed from the proposal in two key respects: "first, it does not specify that the technological measures must be used in connection with the exercise of a right; second, it fails to specify that the technological measure must restrict acts not permitted by law and not only acts not authorized by the rights holder."[167] The seeming result of these revisions is that circumvention itself is enough for liability, not requiring any link to an infringing act under EU copyright law.[168] Soon after its adoption, the Information Society Directive faced much of the same criticism levied at the WCT, specifically that its deference to content creators was the result of the absence of developing nations' opinions (such as South Africa in the WCT formulation, as discussed above), compared to the number of lobbyists from the United States and other developed nations.[169]

Because a directive must be implemented by each of the individual EU countries, the EU member states have varied in their own interpretations of the anti-circumvention provision of the Information Society Directive.[170]

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163. *See* Guibault, Westkamp, & Rieber-Mohn, *supra* note 17, at 73.

164. *See id.* The explanatory memorandum accompanying it explained that "not any circumvention of technical means of protection should be covered, but only those which constitute an infringement of a right, i.e. which are not authorized by law or by the author." *Id.*

165. Council Directive 2001/29, art. 6(1), 2001 O.J. (L 167) 10 (EC).

166. Council Directive 2001/29, art. 6(3), 2001 O.J. (L 167) 10 (EC).

167. Guibault, Westkamp, & Rieber-Mohn, *supra* note 17, at 79.

168. *Infra* Part III.B.1.

169. IMPLEMENTING THE EU COPYRIGHT DIRECTIVE, *supra* note 161, at 9–10. *See generally* Pamela Samuelson & John Browning, *Confab Clips Copyright Cartel*, WIRED (Mar. 1, 1997, 12:00 PM), https://www.wired.com/1997/03/netizen-4/ [https://perma.cc/R29V-4NSZ] (archived Jan. 7, 2022) (describing the failure of the Information Society Directive to consider developing nations opinions).

170. *See* Severine Dusollier, *Tipping the Scales in Favor of the Right Holders: The European Anti-Circumvention Provisions*, *in* DIGITAL RIGHTS MANAGEMENT 462, 464–65 (2003).

1. Selected Implementation of the Information Society Directive

Before delving into European countries' specific approaches to anti-circumvention measures, the preliminary question that must be asked is whether streaming is an act that can infringe a right holder's exclusive right to reproduction. Recently, the European Court of Justice answered this question in the affirmative, so this subpart anticipates that this approach will be accepted and implemented into the various EU countries' laws, as European Court of Justice opinions are binding on the member countries.[171] This subpart examines two countries' approaches to the Information Society Directive's anti-circumvention provision. The differences in these two countries' implementation of the Information Society Directive bears similarities to the US circuit split discussed above.

First, Sweden mirrors the Ninth Circuit in its interpretation of section 1201. Under both jurisdictions' understanding of the anti-circumvention right, there need be no connection to an act of infringement. Additionally, Sweden, like the United States, has typically favored strong authors' rights.

Second, Austria parallels the Federal Circuit's standard requiring a nexus to infringement. Importantly, Austria has incorporated an additional objective standard which is conspicuously absent from the DMCA's anti-circumvention provision. As will be shown, this objective standard properly balances the interests of users and content creators. However, this Note will acknowledge and explain the differences in Austrian copyright law policy, which led to this implementation of the Information Society Directive.

Importantly, this Note does not intend to deeply analyze the two individual countries but rather illustrate the similarities between the approaches of the EU and the United States and emphasize that an approach like Austria's is more desirable than the approaches adopted by the US circuits.

2. Sweden

Sweden expressly limited the circumvention of technological protection measures to acts that are protected by its copyright law. Section 52d of Sweden's copyright act states:

> It is prohibited to circumvent, without the consent of the author or his successor in title, any digital or analogue lock which prevents or limits the making of copies

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171. *See* C-527/15, Stichting Brein v. Wullems, ECLI:EU:C:2016:938, ¶ 83 (Dec. 8, 2016). *See generally* Liang, *supra* note 54 (examining the future of EU copyright law). For a summary of the decision, see Karin Cederlund & Nedim Malovic, *CJEU Revisits Concept of Communication to the Public and Temporary Copies Exemption*, 12 J. INTELL. PROP. L. & PRAC. 892, 892–93 (2017).

> of a work protected by copyright, to circumvent a technological process, such as encryption, that prevents or limits the making available to the public of a work protected by copyright, or to circumvent any other technological measure that prevents or limits such acts of making available.[172]

Section 52b defines "technological measure" as any effective technology "designed to restrict . . . the reproduction or the making available to the public of a copyright-protected work."[173] This definition of technological measure is broad enough to cover circumventions with no connection to an act of circumvention, making the Swedish approach similar to the approach adopted by the Ninth Circuit in *MDY Industries.*

Sweden adopted this provision after thoroughly considering the entirety of the Information Society Directive, with a particular emphasis on the circumvention right. Indeed, the Swedish government delineated these considerations in a lengthy government report.[174] This report examined the Information Society Directive's requirements, concluding that the Information Society Directive did not require the act of circumvention itself to be an infringement of Swedish copyright law but only that the technological measure protect a copyrighted work.[175] The report elaborates on its definition of circumvention to mean only that a user bypasses a technological protection measure without the consent of the rightsholder.[176] Moreover, and of direct relevance to this Note, the report explains that circumventing a service that establishes contracts with end-users—in other words, where a user pays a monthly fee to access a streaming service's library—is prohibited conduct under the statute.

Hostile groups had opposed such a broad prohibition on circumvention, arguing that to allow protection would harm the private use exception. This exception applies where a user owns a

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172. 6a ch. 52d § Lag om upphovsratt till littergra och konstnarliga verk (Rättegångsbalken [RB] 1960:729) (Swed.) (translated from Swedish); *see* Peter Adamsson, *Sweden, in* COPYRIGHT IN THE INFORMATION SOCIETY 915, 916 (Brigette Lindner & Ted Shapiro eds., 2019).

173. 6a ch. 52d § Lag om upphovsratt till littergra och konstnarliga verk (Rättegångsbalken [RB] 1960:729) (Swed.) (translated from Swedish); *see* Adamsson, *Sweden, supra* note 172, at 916.

174. GUIDO WESTKAMP. PART II: IMPLEMENTATION OF DIRECTIVE 2001/29/EC IN THE MEMBER STATES 435–39 (2007).

175. *See Upphovsrätten I informationssamhället— genomförande av direktiv 2001/29/EG* [*Copyright in the Information Society— Implementation of Directive 2001/29 / EC*], REGERINGSKANSLIET 275, 340 (Updated April 2, 2015) [hereinafter *Copyright in the Information Society*], https://www.regeringen.se/49bb64/contentassets/62e9f8f539524f858e2a02113141b3fc/upphovsratten-i-informationssamhallet--genomforande-av-direktiv-200129eg-m.m.-del-2-fr.o.m.-kapitel-8-t.o.m.-bilagor [https://perma.cc/P8N4-GEEM] (archived Jan. 9, 2022); WESTKAMP, *supra* note 174, at 435–37 (2007).

176. *See Copyright in the Information Society*, *supra* note 175, at 340; *see also* WESTKAMP, *supra* note 174, at 435–37.

physical copy but seeks to watch an electronic copy on the internet.[177] Responding to this argument, the Swedish legislature explained that this would still be a lawful use, but the fact that a technological measure prevents lawful conduct does not immediately disqualify the measure from being protected by the statute.[178] To do so, the legislature argued, would mean that Sweden's copyright law would fail to protect the dissemination of new works in the information society as required by the Information Society Directive.[179] Though the legislature spoke clearly on this specific defense, it remains to be seen whether other defenses applicable to copyright apply to its prohibition on circumvention, and if so, how those defenses would work in practice. In other words, by failing to specifically incorporate the traditional copyright infringement defenses, the Swedish legislature placed greater emphasis on the protection of the technological measure itself rather than the underlying work the technological measure was protecting.

Commentators opined that Sweden favored stronger author protection because it has been a jurisdiction that has historically favored strong authors' rights, which predisposed the legislature toward interpreting the Information Society Directive to provide as strong of protection as possible.[180] Importantly, however, the Information Society Directive contained the ambiguity that allowed the Swedish legislature to interpret this provision broadly. Commentators have also noted that copyright piracy has been highly problematic in Sweden, reasoning that the legislature aimed to solve this problem by adopting broad circumvention legislation.[181] This latter point may prove salient given the increase in streaming services and online piracy in the United States.

3. Austria

Section 90c of Austria's copyright law implements the Information Society Directive into Austrian copyright law, creating liability for the

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177. *See* Kristin Friberg, The Swedish Implementation of the Infosoc Directive: Emphasis on the Exception for Private Use (May 31, 2006) (Master's Thesis, Jonkoping University), http://hj.diva-portal.org/smash/get/diva2:4084/FULLTEXT01.pdf [https://perma.cc/DF7G-BLC7] (archived Jan. 9, 2021) (explaining that the problem stems from the absence of a connection to copyright and arguing against implementation of the Information Society Directive in such a broad form). Important too is that this provision generally did not leave room for the typical defenses to copyright infringement present in Swedish law.

178. *See Copyright in the Information Society*, *supra* note 175, at 342; *see also* WESTKAMP, *supra* note 174, at 435–37.

179. *See Copyright in the Information Society*, *supra* note 175, at 342; *see also* WESTKAMP, *supra* note 174, at 435–37.

180. *See* Adamsson, *supra* note 172, at 916.

181. WESTKAMP, *supra* note 174, at 438–39.

circumvention of effective technological measures where those measures are circumvented by a person knowing, or with reasonable grounds to know, that he or she is pursuing that objective.[182] The reasonable requirement in the latter half of the section means that the statute forbids circumvention of protection measures that are meant to hinder the infringements of a rightsholder's exclusive rights. In other words, the prohibition only concerns "circumvention which results in the infringement of an exclusive right."[183] Because the statute requires a connection to infringement, it makes the Austrian requirements look similar to the Federal Circuit's nexus requirement.

But this interpretation has received notable criticism—specifically that while this approach has a "certain charm," it is "certainly not consistent with the" Information Society Directive.[184] This "certain charm" may be from the approach's consistency with the EU's original position regarding the WCT by embodying the EU's original desire to attach a knowledge requirement to the act of circumvention.[185] However, because of the purposeful ambiguity of the Information Society Directive, Austria's implementation is consistent with the Information Society Directive's obligations. Therefore, this criticism is unfounded.

The Austrian system has also been criticized for being too restrictive since a finding of liability requires a finding that the act also infringes an exclusive right under Austrian copyright law.[186] However, this criticism fails to account for the fact that without such a requirement, the Austrian statute would not provide for the defenses already present in Austrian copyright law—a problem apparent in Swedish copyright law. Importantly, it is the requirement that there be a connection to an infringing act that solves the main flaw in the Swedish implementation of the Information Society Directive. By allowing for all affirmative defenses under Austrian copyright law, previous lawful uses are still lawful under the circumvention provision, because where an affirmative defense applies, there is no connection to an infringement of Austrian copyright law.

Additionally, some argue that due to the complexity of Austrian copyright law, the act fails to properly indicate what types of circumventions are legal and which are not.[187] Along a similar line,

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182. *See* IMPLEMENTING THE EU COPYRIGHT DIRECTIVE, *supra* note 161, at 27–28 (explaining the Austrian statute).

183. Florian Pjilapitsch, *Austria*, *in* COPYRIGHT IN THE INFORMATION SOCIETY 127, 151 (Brigette Lindner & Ted Shapiro eds., 2019).

184. Alexander Baratsits, Copyright in the Digital Age – Exceptions and Limitations to Copyright and Their Impact on Free Access to Information (Aug. 17, 2005) (Mag.iur Thesis, Johannes Kepler University Linz) (https://rechtsprobleme.at/doks/baratsits-copyright-digital-age.pdf) [https://perma.cc/PS36-9T5T] (archived Jan. 9, 2022).

185. *See infra* Part II.C.

186. *See, e.g.*, Pjilapitsch, *supra* note 183, at 151.

187. *See, e.g.*, WESTKAMP, *supra* note 174, at 116.

other commentators argue that the failure to adequately delineate legal conduct essentially fails to satisfy the chief goals of the Information Society Directive—namely to adjust EU law in line with technological developments and bring the EU in line with the WCT obligations.[188] First, the mere fact that an act fails to prescribe what specific conduct is prohibited should not be grounds for criticism, as the Swedish approach—and the Information Society Directive itself—are vulnerable to precisely the same argument. This weakness in the Swedish approach is further exemplified by the failure of Swedish legislators to determine whether the traditional defenses to copyright infringement still apply. Second, the ambiguity of the WCT and the Information Society Directive allows Austria to implement a stricter provision, and since the statute does effectively protect technological measures, it furthers the policy of adapting EU law to changing technology.[189]

IV. THE SOLUTION: CREATING LIABILITY FOR AN INTENT TO STREAM

As explained above, the United States' interpretation of the DMCA has resulted in the US circuits splitting over whether an act of circumvention itself is sufficient for liability or whether the act of circumvention must be connected to an act of infringement. Similarly, the EU member states have split in their implementation of the Information Society Directive over the requirement of whether the circumvention must be connected to an act of infringement. Considering that both the DMCA and the Information Society Directive were designed to implement the WCT, both fall short of the WCT's goal of harmonizing international copyright law.[190]

The United States' implementation in the DMCA results in varying liability within US jurisdictions, just as the Information Society Directive's implementation results in differing liability within

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188. *See, e.g.*, Pjilapitsch, *supra* note 183, at 151–55; *see also* Guibault, *supra* note 157, at 1 (listing the chief goals of the Information Society Directive). Commentators have also criticized the Austrian "wait-and-see" approach to the adoption of its directives. *See generally* Urs Gasser, *Legal Frameworks and Technological Protection of Digital Content: Moving Forward towards a Best Practice Model*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 39 (2006).

189. It seems these commentators have misunderstood the purpose of the Information Society Directive as requiring Member States to provide the broadest protection possible. The Information Society Directive requires only *adequate* protections, not *complete* protection. *See* Council Directive 2001/29, art. 6(1), 2001 O.J. (L 167) 10 (EC) (requiring member states to "provide adequate legal protection against the circumvention of any effective technological measures.").

190. This Part acknowledges that ambiguity was an intended part of the WCT, but the WCT has resulted in far more ambiguity than that anticipated by the WCT's authors. *See* REINBOTHE & VON LEWINSKI, *supra* note 67, at 164–68.

member jurisdictions. This ambiguity results in a situation where the same conduct is treated differently, whether done in different circuits in the United States or within different countries of the EU.[191] As works have proliferated across the internet with the increase in the number of streaming services, the divergent standards imposed by jurisdictions have become more apparent.[192]

For this reason, efforts must be made to straighten out the quagmire of differing copyright regimes. However, any effort made must also carefully balance the interests of rightsholders and those who enjoy viewing and accessing copyrighted works. Chiefly, circumvention protection should not be so absolute as to cover *all* uses of a work; for example, covering conduct that is not protected by a nation's own copyright law. The protection of technological measures cannot be absolute but must be tempered in light of copyright law's careful balance between rightsholders and content users.[193] A rule that requires no connection to an infringing act shifts the balance too much toward rightsholders and is why the Ninth Circuit's and Sweden's approach are unwise.

Austria's intent requirement in its statute—that is, a user must circumvent the technological measure with an intent to infringe a copyright—is a sensible one, which comes much closer to striking the proper balance between rightsholders and users. However, this too falls short because it is not well-settled that streaming a copyrighted work in one's home is an infringement. This gap allows a large number of users to access copyrighted works without the author's permission. Thus, an intent requirement specifically applicable to streaming is, as this Part will argue, a solution that does strike the proper balance.

A. *The Intent Requirement*

The solution is the following: the United States should adopt a statute directly applicable to individual users who circumvent digital protection measures. The statute should prescribe that in the case of a digital transmission of an audiovisual work, it is unlawful for an individual to circumvent a technological measure when the act of circumvention is intended to access a DRM for the purpose of a digital transmission of an audiovisual work, without the permission of the copyright owner, when the person should have reasonably known that the service was restricted to only those users who were authorized to

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191. This allows for forum shopping, which is antithetical to the goal of harmonizing the scope of copyright law in a digital age.

192. *See* Jenkins, *supra* note 1 (explaining the dramatic rise of the use of streaming services as well as piracy).

193. Notably, too broad of a circumvention right might lead to undesirable results, such as allowing copyright owners to protect uncopyrightable works or uses of a work which fall under fair use. For example, the Ninth Circuit's rule has been criticized as not allowing for a fair use exception. *E.g.*, BROWN, *supra* note 161, at 10.

access the work, and when no other section 106 defenses apply.[194] This proposed statute has two features drawn from the US and EU's implementation of the WCT: (1) an intent requirement and (2) an objective basis exclusion.

1. An Intent to Receive a Digital Transmission

This statute would require the person circumventing a digital protection measure to do so with the specific purpose of receiving a transmission of a display of the audiovisual work. This differs from both of the US circuit court interpretations of section 1201 because the mere act of circumvention is not enough and because there needs to be no connection to infringement.[195] To allow the mere act itself to be sufficient risks allowing copyright-like protection for works that should already be in the public domain.[196] Considering the length of copyright protection extends in many cases beyond the life of the author,[197] an author must allow those works to enter the public domain, not continue to extend those works' exclusive rights through protecting technological measures.

Of course, one might think this problem is solved by the nexus requirement because if there must be a connection to infringement, then there would be no liability for works in the public domain. But as explained, it is not settled that streaming in one's own home violates an exclusive right.[198] However, in this proposed statute, there would be liability because this statute specifically targets the act of circumvention itself, rather than asking where the infringing act occurs.[199] The proposed statute also allows works to enter the public

194. By reference, this proposed statute incorporates the definitions from the US Copyright Title. *See* 17 U.S.C. § 101 (1976) (listing applicable definitions).

195. *Compare* Chamberlain Grp., Inc. v. Skylink Technologies, Inc., 381 F.3d 1178, 1195–96 (Fed.Cir.2004) (requiring circumvention with a nexus to infringement), *with* MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 944 (9th Cir. 2010) (holding that the act need not be connected to the infringement analysis).

196. *See generally* Eldred v. Ashcroft, 537 U.S. 186 (2003) (upholding extending the duration of copyright protection, while suggesting a disfavor towards congressional attempting to extend the duration in perpetuity).

197. *See* 17 U.S.C. § 302 (generally copyright protections extends to the life of the author plus 70 years).

198. *See, e.g.*, Am. Broad. Companies, Inc. v. Aereo, Inc., 573 U.S. 431, 448 (2014) (explaining that a user who streams copyrighted works at home, alone, does not violate the right to perform a work publicly).

199. For example, the court in *Pizza Limited* looked at where the download occurred, whereas in the proposed statute, a court would ask where the circumvention occurred. *See* IMAPizza, LLC v. At Pizza Ltd., 965 F.3d 871, 877 (D.C. Cir. 2020). This difference is small but important because, while making a copy in another country may not create a cause of action under US copyright law, the circumvention itself still occurred on a US Server, which is enough for a cause of action under this statute, since the statute's relevant conduct occurred on US soil. *See* RJR Nabisco, Inc., 136 S. Ct. at 2101 (2016) ("If the conduct relevant to the statute's focus occurred in the United States,

domain, as it explicitly incorporates section 106 defenses. In other words, one who circumvents a technological measure to view a work in the public domain may raise the defense that the work is not protected by a valid copyright.[200]

However, in adding the language allowing for all applicable section 106 defenses, some might respond that the proposed statute creates an exclusive right to stream, similar to the other section 106 rights.[201] But this is not the case. For example, none of the exclusive 106 rights are limited by any sort of intent requirement,[202] whereas this proposed statute *does* have an intent requirement. Further, copyright acts as a broad negative right, in that the rightsholder has the right to absolutely prevent another from infringing their exclusive rights, whereas here the right only applies in a limited set of circumstances. For example, a user who simply streams a work off of a website might violate a so-called exclusive right to stream but would not violate the proposed statute, because the user did not circumvent any technological protection measure.

This objective requirement distinguishes this proposed statute from the Austrian implementation of the Information Society Directive. The Austrian regime exempts those who circumvent a service that should reasonably have known they were circumventing that service.[203] However, beyond the objective intent of knowing that they are circumventing a technological measure, the statute fails to be specific as to an intent of why the person circumvents the measure. Importantly, this difference matters when the question is whether the person is seeking to access a protected work, rather than seeking to circumvent a technological protection measure in and of itself. Because of this, the intent should be directed at why a person circumvented the technological measure, not whether they intended to circumvent it.[204]

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then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.").

200. *See* Peter B. Hirthe, *When is 1923 Going to Arrive and Other Complications of the U.S. Public Domain*, SEARCHER, Sept. 2012 (describing the framework for analyzing whether a work has entered the public domain).

201. *See* 17 U.S.C. § 106 (listing exclusive rights of copyright)

202. This refers to civil liability for copyright infringement. Criminal copyright liability, on the other hand, does have an intent requirement. *See* 17 U.S.C. § 501(a) (liability for civil copyright infringement, not requiring any *mens rea*). *See generally* U.S. DEP'T OF JUST., PROSECUTING INTELLECTUAL CRIMES (4th ed. 2013) (discussing criminal copyright generally and defining the intent requirement in the statute).

203. *See* BROWN, *supra* note 161, at 27–28 (explaining the Austrian statute).

204. For example, it is unlikely a person circumvents a technological protection simply because they wanted to get around the website. However, it might be the case a person wants to view the content a service has in its collection. Since they are not actually viewing the content, there would be no liability under the proposed statute. But under a rule that looks at the intent to circumvent, there would be liability. The problem with finding the liability in the latter instance is that it provides copyright protection to

As explained above, only creating liability for the circumvention itself risks providing too broad of protection for works that are unprotected under copyright law.

However, having such a specific intent requirement attached to the proposed statute raises a hefty evidentiary concern. Considering that the majority of violations of this proposed statute would target individual users who stream in their own homes, it remains to be seen how one would obtain non-circumstantial evidence of a person's intent.

2. The No-Objective-Basis Exclusion

The next requirement in the statute exempts users who had no objective basis for knowing the work was protected by a technological protection measure. For example, a person who uses a VPN for the purpose of getting around geo-blocking objectively knows the work was not intended to be accessed by someone in their country.[205] This provision is intended to protect one who accidentally circumvents a technological measure without any objective basis to believe that the work was protected by a technological protection measure. This exemption is, admittedly, unlikely to come up in practice as it seems hard to imagine a person would somehow circumvent a technological protection without having at least some knowledge of their conduct. However, the increasing development of new technology emphasizes the importance of leaving room in the statute for unforeseen factual situations.[206]

B. *Fulfilling the WIPO Treaty Obligations*

As explained above, the WCT established broad requirements for the effective protection of technological protection measures. Importantly, the treaty acts as a floor, rather than a ceiling, setting the minimum protection a country should afford. Critics will undoubtedly argue that by establishing such a narrow definition of liability, the statute is not broad enough to effectively protect technological measures.

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a digital protection measure, which is not the type of intellectual property that copyright was designed to protect.

205. This also prevents a person from being willfully blind to their activities. *See* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 34–35 (2d Cir. 2012) (describing the willful blindness doctrine in the criminal copyright statute).

206. A common critique of the Berne Convention, for example, was its failure to account for advances in technology. *E.g.*, DOMBKOWSKI, *supra* note 44.

1. Protecting Technological Measures

The proposed statute is broad enough to effectively protect technological measures, even though the Berne Convention and the WCT do not include a right to stream. Importantly, the proposed statute only applies in the case of the digital transmission of an audiovisual work. In all other circumstances, section 1201 still applies. As noted previously, an individual likely has no liability under the current iteration of section 1201, so this statute would function as a gap-filler. Thus, the treaties would support the statute since it would work to increase the scope of the anti-circumvention protections required by the WCT.[207]

2. Harmonization

Although this solution advocates adopting a provision that is similar to another country's law, one of the purposes of the WCT was to harmonize international copyright law.[208] It might be argued that since this proposed statute creates a unique intent requirement, it would make the United States an outlier. However, perfect harmonization is unattainable in the modern world. Far too many countries have faced issues passing laws under the WCT, and the anti-circumvention provision was among the most difficult to pass when negotiating the WCT.[209] Requiring every country to pass identical laws would be impossible, which explains why the WCT left ambiguity for member countries to select their own preferred level of implementation.[210]

One possible response to this concern is that the EU adopted the Information Society Directive in part because of pressure from the adoption of the DMCA. This indicates that should the US adopt the proposed statute, other countries may be influenced to adopt similar ones too.[211]

To the extent the United States might influence other countries to adopt similar statutes, it might be argued that this is idealistic, because no other country has adopted a streaming right in the context

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207. In other words, it merely extends the scope of liability, which does not lower the standard beneath the floor set by the WCT.

208. *See* MELENDEZ-ORTIZ, DUTFIELD, & BELLMANN, *supra* note 30, at 90 (explaining that the WCT was aimed at addressing many problems in international IP law, with one being the varying regimes of copyright protection found across jurisdictions).

209. *See* HAGGART, *supra* note 14, at 128–29 (describing the anti-circumvention provision as among the most contentious to implement in the United States).

210. *See* Netanel, *supra* note 63, at 443 (explaining that it was necessary for the treaties to leave room for individual countries to enact their own standards, due to the contentious nature of the provision's adoption).

211. *See supra*, Part II-C.

of the anti-circumvention provision.[212] Additionally, considering that developing countries lack the strong preference for author's rights the United States and EU favor, these developing countries are unlikely to adopt similar statutes solely on the grounds the United States adopted the proposed statute.[213]

The concern about developing countries aside, the WCT's ambiguity allows the United States to adopt the proposed statute. Moreover, international copyright law has struggled to keep pace with technological developments, meaning the United States should be proactive when considering new copyright legislation. This is true even if new legislation might harm the harmonization goals of the WCT.

C. *The Focus on Austria*

As discussed above, Sweden is known as a copyright-friendly jurisdiction, standing in opposition to Austria. At first glance, it might appear that the United States would favor the Swedish approach of providing broad protection to technological measures.[214] Considering this, a solution that attempts to adopt the Austrian approach, rather than the Swedish approach, arguably is unlikely to be chosen by the US Congress. However, the US Congress should find the proposed statute favorable because it strikes the proper balance of interests between content users and content creators. In large part, this proper balance is struck because the proposed statute is narrowly tailored to VPN streaming, rather than copyright law writ large.

On one hand, content users' interests are unlikely to be affected by the adoption of the proposed statute. For one, the proposed statute keeps all of the defenses originally present in copyright. As explained above, one of the interpretations of the DMCA has the effect of removing these defenses. Further, the proposed statute is narrowly tailored to prohibit users from wrongfully accessing protected materials. Without the proposed statute, technology companies, have the ability to—and the incentive to—protect materials not covered under US copyright law.[215] To adapt an example from the White Paper,

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212. As this statute is tailored to address only the problem of VPN streaming, this statute would make the United States an outlier in a narrow sense.

213. *See* REINBOTHE & VON LEWINSKI, *supra* note 67, at 166–68. This is especially true since the United States and EU did not consider the opinions of developing nations when negotiating the WCT.

214. *See* LITMAN, *supra* note 79, at 122–30 (2001) (noting the criticism levied at the United States for adopting statutes in its copyright statue that too heavily favor content creators); Peter Adamsson, *Sweden*, *in* COPYRIGHT IN THE INFORMATION SOCIETY 915, 916 (Brigette Lindner & Ted Shapiro eds., 2019) (noting that Sweden has always heavily favored content creators).

215. This allows for all defenses, like fair use.

this Note's proposed solution is akin to making it illegal to unlock the door to a stranger's house.[216]

Similarly, content creators will be placated because this statute will allow them to punish users who access their content through unscrupulous means. As has been explained, under current US law, content creators have no remedies for users who stream copyrighted works in their own home. These content creators might favor a rule that legally strengthens technological protection measures, but as noted above, it is only a matter of time before any technological protection measure is circumvented.[217] Without a legal means to punish and prevent this conduct, service providers will be forced to constantly spend resources developing stronger and stronger measures. Forcing them to bear this burden could increase the cost for new services to enter the market.[218] For these reasons, content creators and service providers should be satisfied the proposed statute provides a remedy to enforce what would otherwise not be copyright infringement.

D. *Implementation Issues*

This proposed statute faces several implementation issues. First, because of the contentious nature of the WCT's anti-circumvention provision and the White Paper's initial struggle through Congress, the proposed statute is likely to face issues in Congress.[219] Second, service providers may be apprehensive to enforce the proposed statute against individual users.

1. Congressional Opposition

While it is true the proposed statute will be difficult to pass in Congress, it is not impossible. For example, Congress recently amended US copyright law through an omnibus bill.[220] As streaming services continue to proliferate, the internet is poised to become a focus in Congress, bringing this issue to the forefront. Related to VPN streaming, the influx of illegal copyright piracy has already resulted in entertainment companies lobbying Congress to amend US copyright

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216. *See* S. REP. NO. 105-190, at 11 (1998) (providing an example of breaking into a house).

217. Gillen & Sutter, *supra* note 31, at 288.

218. It might also be the case that companies might increase the costs of their services, which might then cause more people to look to circumventing the company's technological protection measures.

219. *See* HAGGART, *supra* note 14, at 112 (explaining the struggle to pass the anti-circumvention provision before the WCT's creation based on the contentious nature of the provision).

220. Valinsky, *supra* note 2 (explaining that Congress amended the DMCA through an omnibus spending bill). While this might not be a desirable approach to legislation, it is clear that Congress is willing to amend substantive portions of laws through omnibus bills, making this a real possibility.

law.[221] Lobbying efforts from entertainment companies are crucial to the success of any bill, as these companies have often been the catalyst for new copyright legislation.[222] With attention turning to VPN streaming and entertainment companies lobbying Congress for copyright change, the time is ideal for Congress to consider and pass the proposed statute.

That said, it will still be difficult to implement any changes to the anti-circumvention provision, as exemplified by the difficulty Lehman faced in passing the circumvention provision before the adoption of the WCT.[223] Further, it is arguable the new copyright streaming proposals only passed *because* they were included in an omnibus bill. Before the Protecting Lawful Streaming Act was passed through an omnibus spending bill,[224] Congress had been unable to pass any streaming-related copyright bills since the 2000s.[225] All things considered, passing the proposed statute through Congress will be no easy feat, but with all of the attention drawn to VPN streaming during COVID, one hopes that congressional attention and support for changes to existing copyright law are more than just political posturing.

2. Enforcement Mechanisms

Second, it is questionable whether content owners will enforce the proposed statute against individual users. Because the proposed statute establishes civil liability, the impetus will be on content owners

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221. Entertainment lobbyists have been the impetus for numerous changes within US copyright law. *See, e.g.*, Lanier Saperstein, *Copyrights, Criminal Sanctions and Economic Rents: Applying the Rent Seeking Model to the Criminal Law Formulation Process*, 87 J. CRIM. L. & CRIMINOLOGY 1470 (1997); ELDAR HABER, CRIMINAL COPYRIGHT (2018). Recently, security firms have been lobbying Congress to amend the anti-circumvention provision. *See* John Leyden, *Security Organizations Join Forces with EFF to Lobby for DMCA Reform*, DAILY SWIG (June 24, 2021, 16:45 UTC), https://portswigger.net/daily-swig/security-organizations-join-forces-with-eff-to-lobby-for-dmca-reform [https://perma.cc/WMC9-GH9A] (archived Jan. 7, 2022).

222. *See, e.g.*, Saperstein, *supra* note 221; HABER, *supra* note 221 at 51 (describing the efforts of the music industry to create criminal penalties); Mary Jane Saunders, *Criminal Copyright Infringement and the Copyright Felony Act*, 71 DENV. U.L. REV. 671, 678–80 (1994); Peter S. Menell, *In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. COPYRIGHT SOC'Y U.S.A. 1, 31–33 (2011).

223. *See* HAGGART, *supra* note 14, at 112 (explaining these difficulties). Unfortunately for the proposed statute, it is unlikely another Bruce Lehman will be able to supersede the wishes of Congress through an appeal to WIPO.

224. *See, e.g.*, Abigail Slater & Brad Watts, *The Dawn of a New Era for Copyright Online*, REGUL. REV. (Apr. 12, 2021), https://www.theregreview.org/2021/04/12/slater-watts-dawn-new-era-copyright-online/ [https://perma.cc/TWQ7-WQH8] (archived Jan. 7, 2022) (noting the difficulties enacting copyright law in the digital era).

225. It is important to note, however, that many of these failed attempts related to criminal copyright law. *E.g.*, REGULATORY TRANSPARENCY PROJECT, CLOSING THE STREAMING LOOPHOLE 11–12 (2020) (discussing failed attempts at introducing criminal liability for streaming).

to create the teeth of the proposed statute. There have been instances in the past where entertainment companies enforcing their intellectual property rights faced public backlash from those choices.[226] But public relations questions, such as whether or not to enforce one's rights, are better suited to the board of directors of an individual company rather than for Congress. In other words, companies should be allowed to choose whether they enforce the anti-circumvention provision, and the proposed statute gives companies this option.

Another consideration that supports giving companies the option to enforce their intellectual property rights is that companies pay licensing fees for the use of content in different countries—hence the existence of geo-blocking.[227] If large amounts of users can wrongfully access content, a service provider may face legal liability or economic burden under the current law for violating these licensing agreements. With the addition of this proposed statutory provision, companies would have a better mechanism for enforcing their technological protection measures.

V. CONCLUSION

The WCT's ambiguity has caused both the United States and the EU to split in their respective jurisdictions on the implementation of its anti-circumvention provision. The WCT's anti-circumvention provision requires member states to protect technological measures, but how a state was to implement this provision was left purposefully ambiguous. Due to this ambiguity, both the US circuits and the EU member states have adopted conflicting approaches to implementing the anti-circumvention provision. This raises a problem because of the increase in the number of individuals using VPNs to access streaming services by changing their IP address to bypass geo-blocking restrictions. Because current statutes lack a method to hold individual users liable, large numbers of individuals can access content that they have no permission to access. To solve this specific problem, the United States should implement a statute that provides civil liability for the

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226. *See generally* Daniel Reynolds, *The RIAA Litigation War on File Sharing and Alternatives More Compatible with Public Morality*, 9 MINN. J.L. SCI. & TECH. 977 (2008) (describing the public backlash as a result of aggressive enforcement of copyright infringement suits against individual infringers). Importantly, this public backlash might also provide a way for companies and the public to help strike the proper balance between their interests. Under a typical understanding of the economics of intellectual property, the right to prevent another from using your copyright without your permission destroys your incentives to create new works. It would be detrimental to authors of copyrighted works to allow streaming a work at home to become a public use, considering that is the main target audience of streaming services. *See generally* WILLIAM M. LANDES & RICHARD POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (2003) (describing the economics and incentives behind intellectual property rights).

227. *See* Hoffman, *supra* note 22, at 145–46 (explaining the rationales behind geo-blocking).

circumvention of technological protection measures when the user intends to circumvent a technological protection measure. Such a statute properly balances the rights of content creators, in that they have an avenue to enforce their exclusive rights. This proposed statute also balances the rights of users because the proposed statute is narrowly tailored to only cover users who intend to access works without the copyright owner's permission.

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