DMCA Anti-Circumvention Provisions in a Different Light: Perspectives from Transnational Observation of Five Jurisdictions

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Richard Li-Dar Wang

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I.介绍：DMCA的起源和问题

在1998年10月，美国通过了《数字千年版权法》（“DMCA”），对版权法进行了修订，以应对数字时代带来的挑战。为了保护电影、音乐和计算机软件等版权内容提供商免受未经授权的复制和抄袭，DMCA将反规避规定作为其关键组成部分之一。这些规定旨在防止规避、关闭、中和或以其他方式解除版权所有人在其作品中设置的技术保护措施，以防止未经授权的访问、复制或分发。然而，当DMCA的原始草案在1996年首次提交给国会时，被认为过于争议性而未能进一步推进。1

作为另一个场域，世界知识产权组织（“WIPO”）在1996年12月完成了一轮谈判，最终达成了两个重要的版权协定：《世界知识产权组织版权条约》（“WCT”）和《世界知识产权组织表演和录音制品条约》（“WPPT”）。这两个协定的主要目的是使国际版权体系与数字技术的发展保持一致——几乎与DMCA的同一目的。因此，它们都包含反规避规定。3

3 The language and negotiating history of the WPPT anti-circumvention provision, article 18, and WCT article 11 are virtually identical. To avoid redundancy, this paper will use the WCT as a proxy for the two WIPO treaties.
its passage into law. Nevertheless, the DMCA and the WCT maintain significant differences.4

Since the initial deliberations over the DMCA bill, the U.S. has struggled to find adequate room for fair use privileges in the field of technological protection. Even though the DMCA has been successfully enacted, commentators and consumer groups are still highly concerned about the threat that anti-circumvention measures pose for fair use and for the public domain. The DMCA declares “[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.”5 But this does not mean that fair use is an applicable defense for circumvention over technological measures.6

This article looks first at the law in the U.S., and then proceeds to international anti-circumvention. Given the differences between the DMCA and the WCT, the U.S. legislation obviously is not the only possible model for global anti-circumvention. But the question remains: Is it the best model? This issue becomes more critical in light of the pressure the U.S. government places on its trading partners to adopt the American version of anti-circumvention in their negotiation of bilateral free trade agreements (“FTA”). For instance, in May 2003, Singapore entered into an FTA with the U.S.7 The agreement demands that the contracting parties enforce anti-circumvention provisions very similar to those in the DMCA.8 Therefore, it is informative to look at the compromise reached in the WCT among the U.S. and countries around the world, and to look at how far the U.S. went beyond the WCT in its own domestic legislation. It is also beneficial to explore the legislation of other WCT signatories to see whether they can offer resolutions better than those of the U.S. In fact, facing the same threat to public domain and fair use, the WCT signatories have created various mechanisms to

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8 Id.
reduce the possible negative impact of anti-circumvention measures, thus providing some useful methods to resolving potential problems.\(^9\)

This article compares American anti-circumvention law, the corresponding provisions in the WCT, and the anti-circumvention law of other WCT signatories. Following this introductory segment, this article concisely analyzes the U.S. position as expressed in the DMCA, the positions of other countries in the 1996 WIPO conference, and the final compromise crystallized in article 11 of the WCT. This will serve as a basis for further comparison with other national laws. Next, this article compares U.S. law and the WCT to the laws of three other jurisdictions: the E.U., Japan, and Australia. The content of anti-circumvention provisions and the preservation of the fair use and public domain doctrines can be broken down into two interrelated components: (1) the scope of protection, and (2) the limitations and exemptions. The third and fourth parts of this article compare the two components in turn. The comparison is not meant to be a simple compilation of legislative materials; rather, it is intended to highlight the key differences among their anti-circumvention approaches, particularly the unique ways in which they deal with the common problem that all countries encounter. The two comparative parts lead to a comprehensive evaluation of DMCA anti-circumvention.

From a substantive perspective, as for the scope of protection, Japan adopted a moderate coverage in copyright law, only shielding copying control measures against circumventing businesses and device-trafficking.\(^10\) Regarding limitations and exemptions, the E.U. and Australia created a remarkable set of exemptions to maintain viable fair use privileges in the face of technological

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These approaches offer the public greater leeway to make use of copyrighted works or uncopyrighted materials that are under technological protection. At the same time, these approaches also prevent illicit copying and protect the interest of copyright owners to a certain extent. Countries like the U.S. are tormented with the question of how to preserve fair use and public domain when adopting the anti-circumvention regulation. These findings offer a workable solution from a more global perspective.

II. SETTING THE STAGE: TRACING THE DMCA BACK TO THE WCT

The anti-circumvention regulations in the WCT precede those in the DMCA. In fact, the DMCA developed as a consequence of WCT regulations. This Part first reviews the relationship between the WCT and the DMCA, the two earliest types of anti-circumvention regulation in the world, and then describes and compares the substance of their respective provisions.

A. One U.S. Agenda, Two Different Results

The DMCA was first proposed in 1995 in the so-called “NII White Paper,” authored by the intellectual property group of the Clinton Administration’s Information Infrastructure Task Force (IITF). Around the time of the DMCA’s introduction in Congress, the Clinton Administration was enthusiastically promoting the digital copyright agenda contemplated in the

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14 Samuelson, supra note 1, at 379.
White Paper on the international front.\textsuperscript{15} The administration raised a couple of proposals during the WIPO’s deliberation of a new protocol in the Berne Convention.\textsuperscript{16} The U.S.-proposed anti-circumvention provisions were nearly the same as the bill then being debated in Congress.\textsuperscript{17} In addition, the U.S. pressed for a diplomatic conference to adopt its proposals; that conference was later held in December 1996.\textsuperscript{18} The anti-circumvention provisions were finally adopted in the two treaties—the WCT and the WPPT—concluded at the conference.\textsuperscript{19} However, to the dismay of the U.S., the two treaties diverged greatly from the original U.S. proposal.

Nonetheless, the content industries and the Clinton Administration focused on the positive aspects of the resulting treaties and saw the implementation of the WCT domestically as an opportunity to revive the DMCA. The DMCA bill was reintroduced and enacted into law in October 1998.\textsuperscript{20} With respect to anti-circumvention, the final provisions in the DMCA are quite different from those in the WCT. Basically, the U.S. adopted the original NII White Paper provisions, i.e., provisions that were rejected abroad.\textsuperscript{21}

B. A Brief Overview of the DMCA’s Anti-Circumvention Provisions

The DMCA may contain the most intensive regulation of circumvention activities in the world. To begin with, it covers the technical controls that permit access to copyrighted works for any purpose, including ordinary exploitation of the works, such as browsing, watching, listening, or using. These kinds of measures, commonly called “access controls,” include techniques such as encryption and scrambling. The DMCA not only prohibits the circumvention of access controls,\textsuperscript{22} but also provides that “[n]o person shall manufacture, import, offer to the public, provide or otherwise traffic in any technology, product, service, device, component, or part thereof” that is “primarily designed or

\textsuperscript{15} See id. at 374.
\textsuperscript{16} Id. at 411.
\textsuperscript{17} Id.
\textsuperscript{18} Id. at 369.
\textsuperscript{19} Besek, supra note 12, at 402.
\textsuperscript{20} Id. at 392-93.
\textsuperscript{21} See id.; see also Samuelson, supra note 1, at 374-75, 414-15.
produced for the purpose of circumventing access controls or copying controls. Copying controls are technological measures to prevent unauthorized reproduction of the works, such as the Serial Copy Management System (“SCMS”). The DMCA does not address the circumvention of copying controls themselves, but it does prohibit device-trafficking activities in this category. All violations of these regulations give rise to civil remedies, and willful violations for commercial advantage or financial gain may constitute a criminal offense.

For a technological measure to be protected under the DMCA, it must “effectively control” the access to or the copying of the work. In addition, the DMCA enumerates seven exemptions from these legal protections: (1) the browsing privilege of nonprofit libraries, archives and educational institutions; (2) law enforcement and government activity for the purpose of investigation, protection, information security, or intelligence; (3) reverse engineering; (4) encryption research; (5) minor protection; (6) personal identifying information; and (7) security testing.

The DMCA also authorizes the Librarian of Congress to promulgate additional exemptions to avoid adversely affecting the non-infringing uses of a class of works. These exemptions, though enumerated in the statute or promulgated by the Librarian, are all narrowly tailored to the specific situations articulated in the Act or the rules. Three of the statutory exemptions, and both of the promulgated regulatory exemptions, are directed only at circumvention

23 Id. § 1201(a)(2). Two additional kinds of devices are also prohibited: Devices that “have only limited commercially significant purpose or use other than to circumvent a technological measure,” and devices that are marketed with “knowledge for use in circumvent[ion].” Id. § 1201(a)(2)(B).
24 See Bechtold, supra note 9, at 327.
25 Besek, supra note 12, at 396-97.
27 Id. § 1201(a)(3)(B), (b)(2)(B).
28 Id. § 1201(d)-(j).
29 Id. § 1201(a)(1)(B)-(E). The Librarian has promulgated two exemptions: (1) compilations consisting of lists of websites blocked by filtering software applications; and (2) literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage, or obsoleteness. 37 C.F.R. § 201.40 (2004).
The other four statutory exemptions waive the ban on devices that deactivate access controls. Only the law enforcement exemption includes devices that counteract copying controls.33

According to the statute and judicial rulings, the fair use defense is not applicable to the DMCA. Nevertheless, in part echoing pervasive criticism from academia, courts have recently tried to transform this position and interpret fair use privileges into the realm of anti-circumvention. In Chamberlain Group, Inc. v. Skylink Technologies, Inc., the Federal Circuit ruled that the DMCA does not prohibit circumvention which does not constitute or facilitate copyright infringement. This suggests that the public domain doctrine and fair use would still be effective defenses for circumvention. In Lexmark International Inc. v. Static Control Components, Inc., the Sixth Circuit substantially diminished the purview of “access controls” protected by anti-circumvention and upheld the legality of circumvention for interoperability between competing products.36

These cases bring new uncertainty to this issue. Whether they can bring the DMCA into better harmony with fair use and public domain still remains to be seen. On the other hand, WCT signatories are facing the same problem and have independently developed some insightful resolutions. Examining how other countries have dealt with this problem thus far might help the U.S. eliminate the deadlock caused by the DMCA.

31 17 U.S.C. § 1201(d), (h), (j) (2000); 37 C.F.R. § 201.40 (2004). But see Besek, supra note 12, at 398 n. 26 (identifying that § 1201(h) also covers devices deactivating access controls).
32 17 U.S.C. § 1201(e), (f), (g), (j) (2000); see also Besek, supra note 12, at 397-98.
34 See supra text accompanying notes 5-6.
35 381 F.3d 1178, 1204, 72 U.S.P.Q.2d (BNA) 1225, 1244 (Fed. Cir. 2004).
C. The Debate and Compromise at WIPO: The WCT

The draft WCT provisions of anti-circumvention were initially based on the U.S. proposal put forth in the NII White Paper. The White Paper recommended the following amendment to the U.S. copyright statute:

No person shall import, manufacture or distribute any device, product, or component incorporated into a device or product, or offer or perform any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent, without the authority of the copyright owner or the law, any process, treatment, mechanism or system which prevents or inhibits the violation of any of the exclusive rights of the copyright owner under section 106.

The recommendation only covered the anti-trafficking clause of today’s DMCA. The U.S. deleted the phrase “[without the authorization of] the law” from the original recommendation and submitted its proposal to the WIPO. The draft treaty was published by the WIPO in August 1996, and was closely modeled on the U.S. proposal in this regard. The only difference between them was that the draft treaty reinserted “with authority of the law” as an allowable defense, and added as an additional subjective criterion the element of “knowing or having reasonable grounds to know” that the device is used for a circumvention purpose.

At the diplomatic conference that same year, however, there was little support for the draft treaty. Some countries, like South Korea, opposed in principle the inclusion of any anti-circumvention provisions in the treaty. Others, such as Ghana, Nigeria, Senegal, South Africa, and Australia, expressed

37 See Samuelson, supra note 1, at 411-12; see also INFORMATION INFRASTRUCTURE, supra note 13, app. 1 at 6.
38 INFORMATION INFRASTRUCTURE, supra note 13, app. 1 at 6.
39 Samuelson, supra note 1, at 411.
40 Id. at 370 n.3.
41 Id. at 412.
42 Id. at 411-12.
43 Id. at 414; Vinje, supra note 2, at 235.
44 Samuelson, supra note 1, at 414; Vinje, supra note 2, at 235.
their concerns that technological measures would restrict both the lawful exploitation of copyrighted works and the access to public domain materials. Instead of the anti-trafficking approach, they proposed focusing on the actual use of the device for copyright infringement. Some other countries, like Singapore and the above-mentioned African countries, suggested a “sole purpose” or “sole intended purpose” standard to limit and clarify the scope of the anti-trafficking prohibition. No country advocated passing the draft treaty as it was written. Finally, South Africa proposed a use-based compromise, which had been informally negotiated for some time and was later adopted unanimously by the conference as article 11 of the WCT:

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.

This provision literally limits its scope to infringement-preventing technological measures. Additionally, article 11 also retains authorization of the law as an applicable defense to anti-circumvention. The last provision plainly allows for any reasonable exemptions that address the problem acknowledged in the preamble—“the need to maintain a balance between the

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45 Mihály Ficsor, The Law of Copyright and the Internet 403-04 (2002); Vinje, supra note 2, at 235.
46 Vinje, supra note 2, at 235; see also Ficsor, supra note 45, at 403-04.
47 Samuelson, supra note 1, at 414; see also Ficsor, supra note 45, at 403-04.
48 Vinje, supra note 2, at 235.
49 Id.
51 Id.
52 See id.
rights of authors and the larger public interest, particularly education, research and access to information.\textsuperscript{53}

Two more points about the scope of protection should be mentioned. First, article 11 is literally focused on circumvention acts; it does not refer to device-trafficking activities.\textsuperscript{54} In the negotiating process, the draft provision was abandoned because its main thrust—anti-trafficking—was not approved by most member states.\textsuperscript{55} As a result, the ratified article 11 does not require contracting parties to establish anti-trafficking regulations.\textsuperscript{56} Nonetheless, in view of their practical effect of depriving necessary tools for circumvention, anti-trafficking provisions would provide a legal protection even more effective than the very article literally demands.

Second, article 11 does not expressly define what technological measures the WCT protects.\textsuperscript{57} Instead, it limits the qualified measures to those used in connection with the exercise of the author’s copyrights.\textsuperscript{58} In other words, this provision only condemns the circumvention of technological measures that inhibit or deter copyright infringement. Given that the simple acts of browsing, viewing, listening, or using a copyrighted work cannot constitute copyright infringement, the corresponding technological measures, namely access controls, should not be prohibited in this article. Accordingly, under this line of

\begin{itemize}
\item\textsuperscript{53} Id. pmbl.
\item\textsuperscript{54} See id. art. 11.
\item\textsuperscript{55} See Vinje, supra note 2, at 234-35.
\item\textsuperscript{57} See WIPO Copyright Treaty, supra note 50, art. 11.
\item\textsuperscript{58} Id.
\end{itemize}
interpretation, copying controls are the only technological measures protected under article 11.59

The regulations of anti-circumvention in the WCT and the DMCA are quite dissimilar. For instance, the scope of the DMCA’s anti-circumvention provisions is much broader than those of the WCT. Additionally, in order to maintain the balance between the author’s rights and the public interest, the WCT allows all kinds of reasonable exemptions from anti-circumvention authorized by national laws. In contrast, the DMCA hardly allows any fair use privileges for anti-circumvention. In comparing the two instruments side by side, one would hardly think WCT provisions mimic the exacting protections of the DMCA. Even though they both purportedly adapt the copyright system to the digital environment, the DMCA demonstrates an approach that is quite different in this regard from the thrust of the WCT.

In summary, the WCT protections are very moderate and restricted. The WCT negotiation simply demonstrated that WIPO members did not share U.S. sentiments. In the period following the 1996 WIPO Diplomatic Conference, the U.S. developed a para-copyright model in the DMCA, treating anti-circumvention measures independent of copyright infringement.60 The scope of the DMCA further extends to circumvention of access controls, exceeding the ambit of the author’s exclusive rights.61 Even though the WCT permits reasonable exemptions to balance the author’s rights and public interest, the DMCA only adopts a few exceptions that are necessary for adopting access


61 Id.
control protection. In the next Part, this article reviews other WCT signatory states to find where they fit within the DMCA and WCT spectrum.

III. THE SCOPE OF PROTECTION

Through a brief description of the two anti-circumvention extremes, this article goes on to explore the laws of other WCT signatory countries. The first portion of this comparison deals with the scope of anti-circumvention protection.

A. E.U. Directive: The Broad Model

In June 2001, to implement the WCT mandate, the European Union adopted Directive 2001/29/EC, harmonizing certain aspects of copyright and related rights in member countries. Article 6 and several recitals of the Directive address the anti-circumvention issue. According to article 13(1) of the Directive, member states had to bring into force the laws necessary for their compliance with this Directive before December 22, 2002. If they failed to do so, the Directive would have “vertical direct effect” between member states and its benefiting citizens, so long as the relevant provisions of the Directive, identified by the European Court of Justice, were specific enough to be enforceable in their own right.

With respect to the protected technological measures, the E.U. Directive covers both access controls and copying controls. During the enacting process, the European Council deleted the term “access” from the definition of technological measures in article 6(3), claiming that questions concerning access to copyrighted works lie outside the realm of copyright and thus should not be

65 E.U. Directive, supra note 63, art. 13(1).
addressed in anti-circumvention regulations.68 Nevertheless, the Directive eventually adopted a compromise, retaining the term “access control” in the definition of effectiveness.69 Because the Directive requires member states to provide adequate legal protection against both the circumvention of any effective technological measures and trafficking in devices for the purpose of circumvention, access controls have in reality been incorporated into the protective sphere of the Directive.70

Another issue with protected measures is their relationship with copyright infringement.71 In the European Commission’s proposal for the Directive, article 6 would have only applied to activities infringing a copyright or a right in database.72 But the European Council criticized this limited scope and broadened the final Directive to include any technological measures that prevent or restrict acts not authorized by the rights-holders.73 In this regard, the E.U. goes beyond the international consensus reached in the WCT and takes a position similar to that of the DMCA.74 Yet, the E.U. goes even further because the Directive disallows circumvention of copying controls as well.75 Whether under the E.U. Directive or under the DMCA, anti-circumvention covers all kinds of works except for public domain materials.76 But ordinary users do not necessarily retain viable access to the public domain.77 Because technological protection measures on public domain materials and on copyrighted works may be identical or similar, it is almost impossible to craft a circumvention device

68 Fallenböck, supra note 60, at 40.
69 Id.; see E.U. Directive, supra note 63, art. 6(3).
70 E.U. Directive, supra note 63, art. 6(1)-(2); Fallenböck, supra note 60, at 36.
71 Fallenböck, supra note 60, at 36.
72 Id. at 41-42.
73 Id.; E.U. Directive, supra note 63, art. 6(3).
74 Fallenböck, supra note 60, at 42. The DMCA prohibits circumventing an effective technological measure “without the authority of the copyright owner,” or trafficking in devices for circumventing a technological measure that “effectively protects a right of a copyright owner” in a work. 17 U.S.C. § 1201(a)(1)(A), (a)(3), (b)(1).
75 Fallenböck, supra note 60, at 40-41.
76 Vinje, supra note 4, at 436-37.
77 Id.
exclusively for the former. Unless the users have excellent circumventing skills, they will lack the necessary tools to enjoy materials in the public domain.

As for the prohibited acts, article 6(1) proscribes the circumvention of any effective technological measures when the circumventer either has actual knowledge, or could have reasonably known, of the circumvention. Article 6(2) prohibits the trafficking of circumvention devices that fall into the three categories that are virtually identical to those banned in the DMCA.80

B. Japan: The Moderate Model

Japan amended its Copyright Law ("JCL") in June 1999 to implement the WCT.81 In terms of protected technological measures, JCL only protects copying controls.82 Article 2(xx) of JCL defines technological protection measures as “measures to prevent or deter such acts as constitute infringement on moral rights of authors or copyright . . . or moral rights of performers . . . or neighboring rights.”83 These measures must “adopt systems of recording in a memory or transmitting such signals as having specific effects on machines used for the exploitation of works . . . together with works.”84 This paragraph further excludes “such measures as used not at the will of the right owner from its coverage.”85

The definition above contains two limitations on technological measures. First, the protected technological measures are confined to those that prevent or deter copyright infringement. Because viewing, browsing, or listening to a work is not involved in the coverage of copyright, measures inhibiting these acts—namely, access controls such as encryption and scrambling—do not deter

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78 Id.
79 Id.
82 See id.
83 COPYRIGHT LAW OF JAPAN, supra note 10, art. 2(xx).
84 Id.
85 Id.
infringement of copyrighted works. Consequently, access controls cannot qualify as protected technological measures under JCL. Second, for a technological measure to be protected, it must be mounted at the will of the rights-holder. If a dealer or distributor sets up technical measures in certain works of authorship for its own profit, these measures are also not protected by JCL.

Japanese Unfair Competition Prevention Law (“JUCPL”) also has a set of anti-circumvention provisions. JUCPL protects both access controls and copying controls. As explained below, because the copying control protection afforded by JUCPL is lesser in scope and weaker in effect than JCL, I will discuss JUCPL only as an aspect of access controls.

In terms of prohibited acts, both JCL and JUCPL in principle forbid trafficking in circumvention devices. Given the statutory purpose of ensuring fair competition among entrepreneurs (article 1) and the common nature of unfair competition law, JUCPL should apply only to competitors who violate the law for their commercial gain. Device-trafficking aside, JCL also prohibits circumvention as a business for the public, which has a similar impact on the rights-holder’s interest. A violation of JCL is a criminal offense. For trafficking in access-enabling devices, JUCPL provides only for civil, not criminal, liability.

Although JUCPL offers protection outside of copyright coverage, namely access controls, it has some stricter limitations than JCL. JUCPL only prohibits

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86 Id.; see also Besek, supra note 12, at 432.
87 COPYRIGHT LAW OF JAPAN, supra note 10, art. 2(xx); see also Besek, supra note 12, at 432.
88 KOUSHIDA, supra note 81.
89 Besek, supra note 12, at 433.
90 Id. at 435.
92 COPYRIGHT LAW OF JAPAN, supra note 10, chpt. VIII.
93 OUTLINES AND PRACTICES, supra note 91, at 21-25.
those devices whose sole function is to circumvent technological measures and that have no other function available in relation to economics and commerce.\textsuperscript{94} This limitation is even more restrictive than that in the WCT, which protects all kinds of effective technological measures.\textsuperscript{95} As stated above, the objects of JUCPL should also be limited to the behavior of competitors that is commercially motivated.

All in all, Japan configured its anti-circumvention protection in a moderate manner. JCL follows the WCT in preventing circumvention only to inhibit copyright infringement, thus excluding access controls from its scope of protection. Although JUCPL still protects access controls, its scope is quite narrow—even more restrictive than that of the WCT. Moreover, Japan only prohibited two kinds of activities—device-trafficking and circumvention as a business—to comply with its WCT obligation.\textsuperscript{96} This position supports the analysis above, that even though the WCT on its surface requires protection against circumvention itself, a proscription against device-trafficking could still constitute a sufficient implementation of this requirement.

C. \textit{Australia: Another Moderate Model}

Australia passed a set of amendments to its Copyright Act in August 2000 to implement the WCT, including an anti-circumvention provision.\textsuperscript{97} Regarding protected technological measures, Australia overtly includes both access controls and copying controls in its protective coverage, even though it confines technological measures to those that are designed “to prevent or inhibit

\textsuperscript{94} \textit{Id.} at 23.

\textsuperscript{95} On its face, JCL restricts its coverage to devices whose principal function is the circumvention of technological protection measures. This requirement has been construed similar to the first two prongs of the DMCA test—“primarily designed or produced for the purpose of circumventing,” or “hav[ing] only limited commercially significant purpose or use other than to circumvent.” 17 U.S.C. § 1201(a)(2)(A)-(B). Besek, \textit{supra} note 12, at 433 n.204; see also KOSHIDA, \textit{supra} note 81.

\textsuperscript{96} Besek, \textit{supra} note 12, at 431.

the infringement of copyright in a work.98 It is not clear how many access controls, if any, are possibly designed to prevent or inhibit infringement of the exclusive rights of copyright owners. As to prohibited acts, Australia forbids device- or service-trafficking but does not prohibit circumvention itself.99 There are both criminal penalties and civil remedies for offenders who know or should have known that the device or service would be used to circumvent technological measures.100

Like Japan, Australia has adopted a moderate scope of protection. Essentially, these two countries protect copying controls by prohibiting circumvention device trafficking. They both provide very few safeguards to access controls and generally tolerate circumvention acts. This contrasts with the broad, nearly all-inclusive approach of U.S. and E.U. law.

D. Comparative Summary

Through the comparison of five different bodies of law, three distinct models of protection stand out well. Article 11 of the WCT manifests a minimal type and only prohibits circumvention of copying controls. Both the U.S.-E.U. and Japan-Australia models are broader in scope and effect than the minimal one. All three models are permissible under the WCT so long as each provides “adequate legal protection” and “effective legal remedies” against the circumvention of technological measures used in copyrighted works. Table 1 illustrates different positions of the three types.

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99 Id. § 116A(1).

100 Id. § 116A(1)(c); DIGITAL AGENDA AMENDMENTS, supra note 11, at 2; Besek, supra note 12, at 429.
Table 1. Comparing Anti-Circumvention Protection

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<thead>
<tr>
<th>Protected Measure</th>
<th>Access Control</th>
<th>Copying Control</th>
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<tr>
<td>Prohibited Act</td>
<td></td>
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</tr>
<tr>
<td>Circumvention</td>
<td>Broad: US, EU</td>
<td>Broad: EU</td>
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<td></td>
<td>(circumventing business)</td>
<td>Moderate: Japan</td>
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<td></td>
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<td>Minimal: WCT</td>
</tr>
<tr>
<td>Device-Trafficking</td>
<td>Broad: US, EU</td>
<td>Broad: US, EU</td>
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<tr>
<td></td>
<td>Moderate: Japan (unfair competition); Australia (?)</td>
<td>Moderate: Japan, Australia</td>
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The broad model furnishes a complete shield against all kinds of circumvention-related acts. Conversely, the moderate model focuses on device-trafficking, which can produce the most negative impact. The minimal model provides the least protection, because it offers no protection for circumvention acts of individuals. Such acts are the most common, hard to detect, expensive to litigate, and are a public relations nightmare when the copyright owner files a lawsuit. Given that the WCT does not require an anti-trafficking clause, a contracting party should have the sovereign right to utilize the flexibility embedded in article 11 to choose the most proper way to construct its own anti-circumvention provisions. Consequently, it is hard to exclude the minimal model from possible candidates for WCT implementation.

A particular country’s choice among these models may reflect the goal of its anti-circumvention regulation. For the moderate and minimal models, anti-circumvention is a form of protection ancillary to the existing copyright system.101 The aim of these models is to offset the ease and quality of digital

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101 See Vinje, supra note 2, at 234-35; see also Vinje, supra note 4, at 432-44.
reproduction.102 As a result, they do not extend protection beyond what is necessary to hinder copyright infringement.103 On the other hand, the broad model follows a para-copyright approach, constructing anti-circumvention as a self-sufficient regime of digital-work protection separate from the traditional copyright system.104 Its goal is to inhibit any exploitation of, or access to, the work that is not authorized by the author.105 Therefore, the underlying philosophy of anti-circumvention determines the type and scope of protection adopted by individual WCT member states.

IV. LIMITATIONS AND EXEMPTIONS

The scope of protection, as discussed above, is the initial coverage of anti-circumvention. Through various limitations and exemptions, however, states adjust this coverage to accommodate concerns with other social goals, such as the free flow of information, full exploitation of protected works, facilitation of sequential innovation, and competition of products or services in relevant markets. The following section focuses on how states maintain fair use privileges available and workable in anti-circumvention settings. The analysis again begins with the E.U.

A. The E.U.: Equal-Benefit Exemptions

1. The E.U. Directive

The most prominent feature of European anti-circumvention is its exemptions. The Directive contains two groups of exemptions. The first group is applicable to all kinds of technological measures, including both access controls and copying controls.106 This group of exemptions includes cryptography research (Recital 48) and public security (Recital 51).107 In contrast, the second group of exemptions only applies to copying controls.108 Accordingly, for users to invoke this group of exemptions, they must first obtain access authorization to the work.

102 See Vinje, supra note 2, at 234-35; see also Vinje, supra note 4, at 432-44.
103 See Vinje, supra note 2, at 235.
104 See Vinje, supra note 4, at 432.
105 Id.
106 E.U. Directive, supra note 63, art. 5.
107 Id.
108 Id.
The basic goal of the second group of exemptions is to preserve fair use privileges in the brand new anti-circumvention world.\textsuperscript{109} For the mandatory part of these exemptions, article 6(4), subparagraph 1 selectively recites exceptions to the right of reproduction originally listed in article 5.\textsuperscript{110} Article 5 is an exception-enabling provision. Each member state has the right to decide whether to enact an article 5 exception in its domestic law.\textsuperscript{111} If a member state chooses to enact such an exception, and the exception is cross-referenced to article 6(4), the member state must ensure that the exception’s benefit is equally available to users under technological protection measures.\textsuperscript{112} In other words, the equal-benefit condition forces a member state to provide for these cross-referenced exceptions in its domestic anti-circumvention law.

This equal-benefit group of exemptions embraces several important fair use privileges. It includes the reproduction made by public libraries, educational institutions, museums, and archives; reproduction for the sole purpose of teaching or scientific research; copying of a non-commercial nature to accommodate a person’s disability; and the reproduction of broadcasting made by social institutions such as hospitals or prisons, with mandatory fair compensation to the rights-holders.\textsuperscript{113}

The Directive contains a significant limitation on the state’s responsibility to execute this mandate. Only where the rights-holder fails to take voluntary action to make the recited exceptions publicly available will the state be able to require equal benefits to users.\textsuperscript{114} Pursuant to the language of article 6(4), voluntary conduct, such as an agreement between rights-holders and users, is an affirmative defense to failing to fulfill this obligation.\textsuperscript{115} It is not clear whether the member state can still prescribe these exemptions even when the rights-holder has voluntarily offered the same benefit.

\textsuperscript{109} See id.

\textsuperscript{110} Id. art. 6(4).

\textsuperscript{111} Id.

\textsuperscript{112} Id.

\textsuperscript{113} Id. art. 5.

\textsuperscript{114} Id. art. 6.

\textsuperscript{115} Id.
Besides the mandatory section, the second subparagraph of article 6(4) allows for an optional exemption for private use.\textsuperscript{116} This exemption follows the equal-benefit approach as well. If private use is permitted under a member state’s national law, the member state may choose to adopt this exception to copying control protection upon the condition that it fairly compensate the rights-holder under article 5.\textsuperscript{117} The rights-holder can avoid this exception by voluntarily making the work available to qualified users.\textsuperscript{118} This will deprive the state of this optional power to articulate a private-use exception. The rights-holder is also allowed to require fair compensation and to limit the amount of copying on the voluntary measure.\textsuperscript{119}

In addition, article 6(4) contains another significant limitation on these exemptions. According to subparagraph 4, if the public can access the technically protected work at a time and from a place chosen by them individually, then the whole group of equal-benefit exemptions—no matter whether mandatory or optional—is inapplicable.\textsuperscript{120} This clause is meant to provide extra protection for the growing industry of interactive video/audio service on demand. This limitation excludes all kinds of broadcasting because its pre-scheduled nature does not fit the “individual choice” requirement.\textsuperscript{121} On the other hand, it includes so-called near-video-on-demand services, which broadcast a program several times a day at brief intervals.\textsuperscript{122} In fact, what the interactive on-demand service sells is the one-time right to see, to browse, or to listen, not a hard copy that users can use repeatedly. To prescribe a reproduction exemption would destroy market opportunities for this pay-per-use business.\textsuperscript{123} Moreover, on-demand services do not generate much commercial advertising revenue, which further supports the exclusion of private use and many fair use privileges. Given the choices that consumers may have in service time and place,

\begin{footnotes}
\footnotetext[116]{Id.}
\footnotetext[117]{Id.}
\footnotetext[118]{Id.}
\footnotetext[120]{E.U. Directive, supra note 63, art. 6.}
\footnotetext[121]{Casellati, supra note 119, at 387.}
\footnotetext[122]{Id.}
\footnotetext[123]{Id.}
\end{footnotes}
time-shift watching and listening can no longer provide justification for private use here as it did for video-cassette recorders in the famous U.S. Supreme Court case, *Sony Corp. of America v. Universal City Studios, Inc.*

2. Examples of Implementation: Germany and the United Kingdom

In September 2003, Germany enacted the “Law for the Regulation of Copyright in the Information Society,” adding two new provisions into the German Copyright Act (UrhG)—sections 95a and 95b, which implement the anti-circumvention requirements of the E.U. Directive and the WCT. As for the exemption regime, section 95b(1) produces seven exemptions that are recognized simultaneously in the German copyright law and under article 6(4) of the Directive. This section omits exemptions for reproductions made by public libraries, educational institutions, museums or archives, and reproductions of broadcasts made by social institutions because German law does not have these exceptions to copyright infringement. Germany decided to retain copying control protection rather than prescribe a general exception for private use.

The preamble to section 95b(1) requires rights-holders to provide necessary means for users to benefit from these exemptions. If rights-holders fail to do so, section 95b(2) provides users a right to claim the necessary means from rights-holders. Moreover, according to section 2a of the Law Concerning Actions to Restrain Interference with Consumer Rights and Other Offenses, users can also obtain injunctions from a court. To protect the beneficiaries’ rights

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126 See id. ¶¶ 38 n.87, 45.

127 Id. ¶ 46.

128 Id.

129 Id. ¶¶ 46-47.

130 Id. ¶ 48.

131 Id. ¶ 48 n.101.
effectively, section 3a further permits non-commercial-user associations to file group litigation to seek injunctions.\footnote{132}{Id. ¶ 49.}

Obligating rights-holders to provide necessary means is a remarkable method of overcoming the hardship that anti-trafficking clauses impose on beneficiaries who seek to use these exemptions. When rights-holders violate this obligation, however, German law only provides a cause of action to claim the necessary means and to seek injunctions against further failure to afford such means. German law does not provide a countervailing right to obtain the necessary tools from other sources and to make immediate use of the exemptions.\footnote{133}{Id. ¶ 48.} Even in a group litigation situation, the judgment is only binding on the parties of the case; other beneficiaries must file separate suits to redress violations.\footnote{134}{See id. ¶ 49.} Given the prolonged, costly, and burdensome process of litigation, it is doubtful whether this remedy would be effective. Without a forceful and efficient enforcement scheme, the German exemptions may not be effective in practice.


Section 296ZE of the amended U.K. IPR Act provides a number of exceptions to the anti-circumvention provisions.\footnote{138}{Copyright Regulations 2003, supra note 135, § 296ZE.} These acts embrace a wide
range of exceptions recited in article 6(4) of the E.U. Directive. But as to private use, the U.K. Regulations provide exemptions only for research and private study. Persons who are prevented by technological measures from performing an otherwise permitted act may file a complaint with the Secretary of State. The Secretary may then issue a written direction to the rights-holder or the exclusive licensee of the work to find out whether any voluntary measure or agreement related to the work exists, or, where there is no existing voluntary measure or agreement, to ensure the rights-holder or exclusive licensee provides the necessary means for the complainant to carry out the permitted act. Compliance with the directive is mandatory, and failure to comply is actionable by the complainant.

The enforcement mechanism in the U.K. is even weaker than that in Germany. In the U.K., the rights-holder or exclusive licensee has no preexisting obligation to facilitate permitted acts unless the Secretary issues a directive requiring the rights-holder to do so. Second, when a complaint is filed, the Secretary is not statutorily obliged to issue such an order. The U.K. Regulations themselves provide no guidance as to the circumstances under which a directive should be issued. The complainant has no right to appeal if

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139 Id. schedule 3.
140 Id.
142 Copyright Regulations 2003, supra note 135, § 296ZE(3).
143 Id. § 296ZE(5).
144 Id. § 296ZE(6).
145 Id. § 296ZE(5); Shah, supra note 141, ¶ 41; Julian Midgley, Critique of the Proposed UK Implementation of the EU Copyright Directive (2002), http://ukcdr.org/issues/eucd/ukimpl/critique_uk_impl.pdf.
146 Copyright Regulations 2003, supra note 135, § 296ZE(3)-(4); Midgley, supra note 145; Brown & Bohm, supra note 136, at 126 (quoting statements of the Libraries and Archives Copyright Alliance).
147 Copyright Regulations 2003, supra note 135, § 296ZE(3)-(4).
the Secretary does not respond adequately.148 Third, if the rights-holder does not follow the Secretary’s directive, the complainant must file suit to enforce his right.149 This makes the prerequisite complaint process to the Secretary redundant.150

Finally, the U.K. Regulations have the same problem as the German Regulations: Users must file complaints and lawsuits on a case-by-case basis whenever technological measures restrain permitted acts.151 All of the foregoing factors make the execution of the E.U. exemption regime cumbersome and impractical.152 The requirement in the Directive that no voluntary measures be available has made the execution process ineffective when implemented by member states. Without an efficient and effective enforcement mechanism, it is tough for individual users to fight against rights-holders such as big entertainment or software companies.153

B. Japan: Few Significant Exemptions

There are few important limitations on Japanese anti-circumvention protection. As mentioned above, JCL contains no exemptions from copying control protection.154 JUCPL requires that circumvention be the sole function of its prohibited devices.155 It also contains exceptions for examination and research of technological measures.156 The reason for the scarcity of exemptions may be

148 Id.; Shah, supra note 141, ¶ 41; Brown & Bohm, supra note 136, at 126 (quoting statements of the Libraries and Archives Copyright Alliance and the Royal National Institute of the Blind).

149 Copyright Regulations 2003, supra note 135, § 296ZE(6).

150 Midgley, supra note 145; Brown & Bohm, supra note 136, at 126 (quoting statements of the Campaign for Digital Rights).

151 Copyright Regulations 2003, supra note 135, § 296ZE (2)-(6); Brown & Bohm, supra note 136, at 126-27 (quoting statements of the Libraries and Archives Copyright Alliance and the Royal National Institute of the Blind).


153 FOUND. FOR INFO. POL’Y RES., supra note 152.

154 See supra text accompanying notes 81-83.

155 OUTLINES AND PRACTICES, supra note 91, at 21.

156 Id. at 37.
rooted in the JUCPL scope of protection. If Japan adheres to its moderate approach in scope, it would not call for more exemptions. In essence, Japan confines its anti-circumvention protection to prevent copyright infringement only. As long as Japan does not consider fair use to be copyright infringement, and thus excludes it from the ambit of anti-circumvention, there is no need for further exemptions or limitations as required by other WCT signatories.157

C. Australia: User-Declaration Scheme

Australia only prohibits device-trafficking, including circumvention services.158 Like the E.U., Australia provides for a series of exceptions for device makers, distributors, and service providers. There are some specific exceptions to anti-circumvention, such as for law enforcement and national security purposes.159 In addition, some exceptions in traditional copyright law are extended to anti-circumvention settings, so as to keep these privileges intact when the non-protected form of the work is not readily available to users.160 This is another regime based on the ideal of equal benefit. Because these exemptions are enjoyed exclusively by qualified persons for certain permitted purposes, Australia has designed a user declaration scheme to ensure that circumvention devices and services are available only to qualified persons and to provide a legal means for distributors to traffic devices.161 When obtaining circumvention devices or services, the qualified user must make a declaration that contains, inter alia, the permitted exemption and the basis qualifying him for that exemption.162 The user must also declare that the non-protected form of this work is not available to him and that the device or service will be used solely for the permitted exemption. It is a criminal offense to make a knowingly or recklessly false declaration.

The declaration scheme covers a number of important copyright exceptions, including reproducing computer programs for security testing, debugging, or interoperability; reproducing and communicating works by

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157 Nevertheless, the spillover effect of the anti-trafficking clause may still occur under existing Japanese law; see infra text accompanying note 159.

158 See Digital Agenda Amendments, supra note 11, at 2.

159 Australian Copyright Act, supra note 98, § 116A(2).

160 Id. § 116A(3), (3)(b)(v), (4).

161 Id. § 116A(3), (3)(a).

162 Id. § 116A(3)(b).
libraries and archives for other libraries, archives, or users; and reproducing and communicating for educational, preservation, or other institutional purposes.\footnote{DIGITAL AGENDA AMENDMENTS, supra note 11, at 2; Besek, supra note 12, at 430-31.} This exemption scheme puts forth an ingenious solution to the spillover problem that anti-trafficking clauses usually impose on privileged circumvention. Because circumvention requires technical expertise, users often have to acquire devices to enable them to circumvent the protection measures. However, under the device-trafficking ban, users lose access to necessary tools for utilizing public domain materials or other permissible methods of circumvention.

The Australian declaration scheme is a perfect way to carve out a tailor-made exception to supply the essential tools for the beneficiaries of permitted exemptions. This scheme successfully reconciles the underlying conflict between exempted circumvention and anti-trafficking stipulation. Nevertheless, this problem occurs not only in exemptions, but also in the public domain and with other materials that are not protected by anti-circumvention but may be blockaded by technological measures and anti-trafficking clauses. To solve this spillover effect of anti-trafficking, it is essential to extend the declaration scheme to these non-proprietary areas.

D. **Comparative Summary**

The DMCA declares in section 1201(c)(1) that anti-circumvention shall not affect fair use privileges for copyright law.\footnote{17 U.S.C. § 1201(c)(1) (2000).} However, the DMCA neither recognizes nor includes fair use in the regulations against circumvention. This position triggers long-lasting criticism on its restrictiveness and over-regulation. Across the Atlantic, the E.U. proclaims in the Directive that “the legal protection of technological measures applies without prejudice to public policy, as reflected in Article 5”--namely, the exceptions and limitations on the reproduction right of copyright owners (Recital 51).\footnote{E.U. Directive, supra note 63, pmbl.} The E.U. further carries it out in article 6(4) and in corresponding domestic laws, which together construct a whole regime of equal benefits to ensure several article 5 privileges are also available in the field of technological measures.\footnote{Id. art. 6(4).} Even though the domestic laws implemented in Germany and U.K. are too weak to fulfill the ideal of equal benefits, this regime...
is still a remarkable framework to incorporate fair use into anti-circumvention provisions.

What the regime lacks is an effective mechanism of enforcement. With no similar regime of exemptions, the U.S. is still obsessed with the role of fair use in anti-circumvention and struggles to strike a balance with the technological measures it employs.\(^{167}\) The exceptions to access controls in the U.S., such as for protecting minors or personal identifying data, are certainly noteworthy for the European countries. Yet if fair use is truly a concern in the U.S., the E.U. regime of equal benefits deserves greater attention there.

If the U.S. were considering bringing fair use privileges back into anti-circumvention, it should avoid imposing the condition seen in Europe and Australia that the work is not otherwise available to users. As the situations in Germany and the U.K. well demonstrate, this prerequisite gives content industries a second bite to derogate the equal-benefit guarantee of fair use. It would also be difficult to determine whether the copyright owner in a specific case has voluntarily made the work available to the adversely affected user. For instance, does voluntary availability mean acquisition for free? If not, what is the reasonable price for fair use? These problems will definitely hamper the efficacy of fair use privileges and could be adequately averted by omitting this precondition.

Japanese law illustrates another possibility for incorporating fair use into anti-circumvention—excluding fair use from the initial coverage of anti-circumvention. However, the prohibition on device-trafficking and circumventing business in Japan stifles fair use and the public domain by depriving qualified users of necessary tools. This highlights the value of the Australian declaration scheme. The Australian scheme allows distributors to provide circumvention devices to qualified users for permitted purposes only. It thus provides a viable channel for beneficiaries to obtain necessary instruments to carry out their privileges. In sum, the Australian regime combines the ideal of equal benefit and practical enforcement schemes in a manner that appears to facilitate fair use privileges better than any other arrangement discussed thus far.

\(^{167}\) See supra text accompanying notes 27-33.
V. ASSESSMENT OF DMCA ANTI-CIRCUMVENTION

The DMCA is not a paradigm of anti-circumvention, because it poses a threat to fair use and public domain. The content industries overwhelmingly won the battle in Congress when the DMCA was propounded for the second time. The statute provides broad protection to those industries. Except for the exemption of reverse engineering, there is virtually no traditional fair use privilege for anti-circumvention. Though the DMCA permits reverse engineering, it prohibits trafficking of devices working against copying controls. As a matter of fact, with the exception of the law enforcement privilege, the DMCA affords no exemption from the anti-trafficking prohibition. This is quite different from the E.U. and Australia, which unequivocally sustain a number of reproduction privileges in traditional copyright law. In the U.S., it falls to the courts to revitalize fair use and achieve adequate balance in American anti-circumvention. It is still too early to say what type of change courts can effect.

Actually, public domain and fair use have been elevated to a constitutional level in the U.S. In Eldred v. Ashcroft, the U.S. Supreme Court recognized that the fair use defense and idea-expression dichotomy are two “built-in First Amendment accommodations” of copyright law. They help to promote creation and publication of expression and prevent copyrights from

168 Some optimistic commentators, though admitting extant DMCA anti-circumvention may negatively impinge on fair use and public domain, assert that the benefit it produces—“more works available to consumers at a variety of price and convenience points,” particularly the possibility that authors can skip intermediaries and publish their works independently through the Internet—outweighs all the possible harm that it may cause. Ginsburg, supra note 59, at 25-26 (citing to Besek, supra note 12, at 512-13).

contravening the right of free speech. Justice Breyer pointed out in his dissenting opinion another constitutional aspect of the public domain: The Constitution explicitly limits the exclusive right of copyright owners to a limited duration. Beyond this duration, copyrighted works will fall into the public domain open for everyone to use. These constitutional limitations on copyright law further distinguish the U.S. from the E.U. and other states. Given the constitutional significance of public domain and fair use in the U.S., Congress and the courts should take them more seriously than any other jurisdiction. The reality so far, however, is obviously to the contrary.

From this point of view, the U.S. would have difficulty legitimizing its aggressive attitude toward incorporating American-style anti-circumvention into bilateral or multilateral FTAs. Through FTAs, the Office of the United States Trade Representative now vigorously tries to duplicate the U.S. intellectual property law in foreign countries, using the U.S.-Singapore FTA as a template. This can surely be done through power politics. But in light of domestic criticism and recent adverse judicial decisions, DMCA anti-circumvention is evidently not appropriate for fierce advocacy before the rest of the world. If the U.S. would like to see its FTA trading partners establish certain institutions in exchange for


171 Eldred, 537 U.S. at 242, 65 U.S.P.Q.2d (BNA) at 1250-51 (Breyer, J., dissenting) (citing to U.S. CONST. art. I, § 8, cl. 8, which states that Congress has the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

172 Id. at 255-59, 65 U.S.P.Q.2d (BNA) at 1256-58 (Breyer, J., dissenting).

173 For instance, commentators predict that if the USTR begins FTA negotiations with Taiwan, it will seek intellectual-property provisions at least commensurate to those in the U.S.-Singapore FTA. See Nicholas R. Lardy & Daniel H. Rosen, Prospects for a US-Taiwan Free Trade Agreement 34 (2004).
increasing exports to the U.S., first it should ensure that these institutions are well-organized and work properly at home.

VI. CONCLUSION

Anti-circumvention regulations can be roughly divided into two parts: the scope of protection and the limitations or exemptions. Three possible models exist for the scope of protection—the broad, the moderate, and the minimal. Each serves different policy purposes. As seen in the U.S. and the E.U., the broad model embraces both access controls and copying controls. It protects content better, especially music and audiovisual works whose economic value mainly resides in one-time viewing or listening.

The moderate model, such as those adopted by Japan and Australia, conforms to the traditional scope of copyright protection. To avoid unnecessary intrusion on the freedom of using, viewing, browsing, or listening to the work, and the freedom to disseminate information, this model prohibits trafficking in circumvention devices and services only. The minimal model is the lowest protection level required by the WCT. It prohibits circumvention acts against copying controls, which are more difficult to detect and litigate than device-trafficking behaviors.

With regard to exemptions, the leeway laid down in the WCT is broad yet vague, and those in the DMCA are not sufficient to address the need to preserve the fair use defense and the public domain doctrine. The most creative and desirable arrangement, however, is certainly the Australian regime of exemptions. Australia combines the E.U. regime of equal benefits with its own user-declaration scheme. The former intends to bring substantial reproduction privileges into the anti-circumvention setting. The latter furnishes the equal-benefits regime with a reliable execution mechanism and eliminates the spillover pitfalls that the anti-trafficking provision creates for beneficiaries who enjoy these privileged exemptions. The Australian framework successfully preserves the fair use defense and the public domain doctrine in the jungle of anti-circumvention and provides for a practical way to make real use of them. It could serve as a great model for countries constructing their own anti-circumvention provisions.
Some commentators have worried that the delicate balance in copyright law between authors and the public will be displaced by trade policies. But observing the wisdom and ingenuity of different countries manifested in their anti-circumvention provisions, it may be premature to predict the demise of traditional copyright deliberation. The wisdom of a legal community often reveals itself in its legislation. For states that are dominated by commercial interests and copyright owners, it would be advisable to look around and see how other states endeavor to preserve the balance of copyright in the digital age.


175 Cf. Samuelson, *supra* note 1, at 375.