

381 F.3d 1178
United States Court of Appeals,
Federal Circuit.

The CHAMBERLAIN GROUP, INC., Plaintiff–Appellant,
v.
SKYLINK TECHNOLOGIES, INC., Defendant–Appellee.

No. 04–1118. | DECIDED: Aug. 31, 2004. | Rehearing and Rehearing En Banc Denied
Oct. 22, 2004.

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GAJARSA, Circuit Judge.

The Chamberlain Group, Inc. (“Chamberlain”) appeals the November 13, 2003 summary judgment of the United States District Court for the Northern District of Illinois (“District Court”) in favor of Skylink Technologies, Inc. (“Skylink”), finding that Skylink is not violating the anti-trafficking provisions of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 1201 et seq., and dismissing all other claims, including claims of patent infringement. *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 292 F.Supp.2d 1040 (N.D.Ill.2003) (“*Chamberlain II*”). * * *

Chamberlain’s claims at issue stem from its allegation that the District Court incorrectly construed the DMCA as placing a burden upon Chamberlain to prove that the circumvention of its technological measures enabled *unauthorized* access to its copyrighted software. But Skylink’s accused device enables only uses that copyright law explicitly authorizes, and is therefore presumptively legal. Chamberlain has neither proved nor alleged a connection between Skylink’s accused circumvention device and the protections that the copyright laws afford Chamberlain capable of overcoming that presumption. Chamberlain’s failure to meet this burden alone compels a legal ruling in Skylink’s favor. We therefore affirm the District Court’s summary judgment in favor of Skylink.

BACKGROUND

A. *The Applicable Statute*

* * * The matter on appeal involves only Chamberlain’s allegation that Skylink is violating the DMCA, specifically the anti-trafficking provision of § 1201(a)(2).

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B. The Dispute

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

When a homeowner purchases a GDO system, the manufacturer provides both an opener and a transmitter. Homeowners who desire replacement or spare transmitters can purchase them in the aftermarket. Aftermarket consumers have long been able to purchase "universal transmitters" that they can program to interoperate with their GDO system regardless of make or model. Skylink and Chamberlain are the only significant distributors of universal GDO transmitters.¹ Chamberlain places no explicit restrictions on the types of transmitter that the homeowner may use with its system at the time of purchase. Chamberlain's customers therefore assume that they enjoy all of the rights associated with the use of their GDOs and any software embedded therein that the copyright laws and other laws of commerce provide.

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

The code in a standard (i.e., non-rolling code) GDO transmitter is unique but fixed. Thus, according to Chamberlain, the typical GDO is vulnerable to attack by burglars who can open the garage door using a "code grabber." According to Chamberlain, code grabbers allow burglars in close proximity to a homeowner operating her garage door to record the signal sent from the transmitter to the opener, and to return later, replay the recorded signal, and open the garage door. Chamberlain concedes, however, that code grabbers are more theoretical than practical burgling devices; none of its witnesses had either firsthand knowledge of a single code grabbing problem or familiarity with data demonstrating

*1184 the existence of a problem. Nevertheless, Chamberlain claims to have developed its rolling code system specifically to prevent code grabbing.²

The essence of the rolling code system is that the transmitted signals are broken into fixed and variable (or “rolling”) components. The entire transmitted signal is a bit string. The fixed component serves to identify the transmitter. The rolling component cycles through a lengthy cycle of bit strings only some of which are capable of opening the door at any given time, ostensibly so that a burglar replaying a grabbed code is unlikely to send a valid signal—and therefore unlikely to open the garage door.

A user wishing to set up a new transmitter for use with her Security+ GDO must switch the opener to “program mode” and send a signal from the transmitter to the opener. The opener stores both the fixed and rolling components of the transmitted signal. When the user switches the opener back to “operate mode,” the system is set and the user may operate the opener with the newly programmed transmitter. In Chamberlain’s transmitter, a computer program increases the rolling code by a factor of three each time the user activates the transmitter. When the transmitted signal reaches the receiver, a program in the opener checks to see whether the rolling code received was identical to one of the most recently received 1,024 rolling codes (the “rear window”). If so, it will not activate the motor. If, on the other hand, the rolling code received is among the next 4,096 binary signals (the “forward window”), the receiver will activate the motor.

Not all recognized binary rolling signals are in either the forward or rear windows. If the transmitter sends a *single* signal outside of either window, the receiver will ignore it. If, however, the transmitter sends *two* signals outside either window in rapid succession, the opener will again access its programming, this time to determine whether the two signals together comprise a “resynchronization” sequence. If the signals differ by three, the receiver will reset the windows and activate the motor. According to Chamberlain, resynchronization accommodates the possibility that homeowners using the same transmitter for multiple residences may transmit so many signals while out of range of the opener that they exhaust the entire forward window.

Skylink began marketing and selling universal transmitters in 1992. Skylink designed its Model 39, launched in August 2002, to interoperate with common GDOs, including both rolling code and non-rolling code GDOs.³ Although Chamberlain concedes that the Model 39 transmitter is capable of operating many different GDOs, it nevertheless asserts that Skylink markets the Model 39 transmitter for use in circumventing its copyrighted rolling code computer program. Chamberlain supports this allegation by pointing to the Model 39’s setting that operates *only* Chamberlain’s rolling code GDOs.

Skylink’s Model 39 *does not* use rolling code technology. Like Chamberlain’s products, however, the Model 39’s binary signal contains two components. The first corresponds to the Chamberlain’s fixed *1185 component identifying the transmitter, and the second

simulates the effect of the Chamberlain's rolling code. Like the Chamberlain fixed component, the primary role of the Model 39's identifying component is in programming; a homeowner wishing to use a Model 39 in conjunction with a Chamberlain GDO must program the opener to recognize his newly purchased transmitter. When the homeowner actually uses the transmitter, it broadcasts *three* fixed codes in rapid succession. The first binary signal combines the identifying component with an arbitrary binary sequence. The second binary signal subtracts 1800 from the first signal. The third signal adds three to the second signal. The combination of these three codes transmitted with every press of the Model 39 transmitter button will either cause the Chamberlain GDO to operate in response to the first fixed code or cause the GDO to resynchronize and operate in response to the second and third fixed codes. Chamberlain characterizes this procedure as a circumvention of an important security measure; a code grabber that recorded the Model 39's three codes could later play them back and activate a Chamberlain rolling code GDO without authorization.

These facts frame the dispute now before us on appeal. Though only Chamberlain's DMCA claim is before us, and though the parties dispute whether or not Skylink developed the Model 39 independent of Chamberlain's copyrighted products,⁴ it is nevertheless noteworthy that Chamberlain *has not* alleged either that Skylink infringed its copyright or that Skylink is liable for contributory copyright infringement. What Chamberlain *has* alleged is that because its opener and transmitter both incorporate computer programs "protected by copyright" and because rolling codes are a "technological measure" that "controls access" to those programs, Skylink is prima facie liable for violating § 1201(a)(2). In the District Court's words, "Chamberlain claims that the rolling code computer program has a protective measure that protects itself. Thus, only one computer program is at work here, but it has two functions: (1) to verify the rolling code; and (2) once the rolling code is verified, to activate the GDO motor, by sending instructions to a microprocessor in the GDO." *Chamberlain I*, 292 F.Supp.2d at 1028.

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DISCUSSION

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D. The Statute and Liability under the DMCA

The essence of the DMCA's anticircumvention provisions is that §§ 1201(a),(b) establish causes of action for liability. They do not establish a new property right. The DMCA's text indicates that circumvention is not infringement, 17 U.S.C. § 1201(c)(1) ("Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright

infringement, including fair use, under this title.”), and the statute’s structure makes the point even clearer. This distinction between property and liability is critical. Whereas copyrights, like patents, are property, liability protection from unauthorized *1193 circumvention merely creates a new cause of action under which a defendant may be liable. The distinction between property and liability goes straight to the issue of authorization, the issue upon which the District Court both denied Chamberlain’s and granted Skylink’s motion for summary judgment.

A plaintiff alleging copyright infringement need prove *only* “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Pub., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991); *see also Harris Custom Builders, Inc. v. Hoffmeyer*, 92 F.3d 517, 519 (7th Cir.1996). “[T]he existence of a license, exclusive or nonexclusive, creates an affirmative defense to a claim of copyright infringement.” *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir.1996). In other words, under Seventh Circuit copyright law, a plaintiff only needs to show that the defendant has used her property; the burden of proving that the use was authorized falls squarely on the defendant. *Id.* The DMCA, however, *defines* circumvention as an activity undertaken “without the authority of the copyright owner.” 17 U.S.C. § 1201(a)(3)(A). The plain language of the statute therefore requires a plaintiff alleging circumvention (or trafficking) to prove that the defendant’s access was unauthorized—a significant burden where, as here, the copyright laws authorize consumers to use the copy of Chamberlain’s software embedded in the GDOs that they purchased. The premise underlying this initial assignment of burden is that the copyright laws authorize members of the public to access a work, but not to copy it. The law therefore places the burden of proof on the party attempting to establish that the circumstances of its case deviate from these normal expectations; defendants must prove authorized copying and plaintiffs must prove unauthorized access.

The distinction between property and liability also addresses an important policy issue that Chamberlain puts into stark focus.¹⁰ According to Chamberlain, the 1998 enactment of the DMCA “renders the pre-DMCA history in the GDO industry irrelevant. By prohibiting the trafficking and use of circumvention technology, the DMCA fundamentally altered the legal landscape.... Any analysis of practices within the GDO industry must now be undertaken in light of the DMCA.” Chamberlain reiterated and strengthened this assertion at oral argument, claiming that the DMCA overrode all pre-existing consumer expectations about the legitimate uses of products containing copyrighted embedded software. Chamberlain contends that Congress empowered manufacturers to prohibit consumers from using embedded software products in conjunction with competing products when it passed § 1201(a)(1). According to Chamberlain, *all* such uses of products containing copyrighted software to which a technological measure controlled access are now per se illegal under the DMCA unless the manufacturer provided consumers with *explicit* authorization. Chamberlain’s interpretation of the DMCA would therefore grant manufacturers broad exemptions from

both the antitrust laws and the doctrine of copyright misuse.

Such an exemption, however, is only plausible if the anticircumvention provisions established a new property right capable of conflicting with the copyright owner's other legal responsibilities—which as we have already explained, they do not. The anticircumvention provisions convey no additional property rights in and *1194 of themselves; they simply provide property owners with new ways to secure their property. Like all property owners taking legitimate steps to protect their property, however, copyright owners relying on the anticircumvention provisions remain bound by all other relevant bodies of law. Contrary to Chamberlain's assertion, the DMCA emphatically *did not* “fundamentally alter” the legal landscape governing the reasonable expectations of consumers or competitors; *did not* “fundamentally alter” the ways that courts analyze industry practices; and *did not* render the pre-DMCA history of the GDO industry irrelevant.

What the DMCA did was introduce new grounds for liability in the context of the unauthorized access of copyrighted material. The statute's plain language requires plaintiffs to prove that those circumventing their technological measures controlling access did so “without the authority of the copyright owner.” 17 U.S.C. § 1201(3)(A). Our inquiry ends with that clear language. We note, however, that the statute's structure, legislative history, and context within the Copyright Act all support our construction. They also help to explain why Chamberlain's warranty conditions and website postings cannot render users of Skylink's Model 39 “unauthorized” users for the purposes of establishing trafficking liability under the DMCA.

E. Statutory Structure and Legislative History

* * *

Because the DMCA is a complex statute creating several new causes of action, each subject to numerous exceptions, we must also ensure that our construction makes sense given the statute's entirety. We must therefore consider briefly the relationship among the liabilities created under §§ 1201(a)(1), (a)(2), and (b). Statutory structure and legislative history both make it clear that § 1201 applies only to circumventions reasonably related to protected rights. Defendants who traffic in devices that circumvent access controls in ways that facilitate infringement may be subject to liability under § 1201(a)(2). Defendants who use such devices may be subject to liability under § 1201(a)(1) whether they infringe or not. Because all defendants who traffic in devices that circumvent rights controls necessarily facilitate infringement, they may be subject to liability under § 1201(b). Defendants who use such devices may be subject to liability for copyright infringement. And finally, defendants whose circumvention devices do not facilitate

infringement are not subject to § 1201 liability.

The key to understanding this relationship lies in § 1201(b),¹² which prohibits trafficking in devices that circumvent technological measures tailored narrowly to protect an individual right of the copyright owner while nevertheless allowing access to the protected work. Though § 1201(b) parallels the anti-trafficking ban of § 1201(a)(2), there is no narrowly tailored ban on direct circumvention to parallel § 1201(a)(1). This omission was intentional.

The prohibition in 1201(a)(1) [was] necessary because prior to [the DMCA], the conduct of circumvention was never before made unlawful. The device limitation in 1201(a)(2) enforces this new prohibition in conduct. The copyright law has long forbidden copyright infringements, so no new prohibition was necessary. The device limitation in 1201(b) enforces the longstanding prohibitions on infringements.

S.Rep. No. 105–90 at 12 (1998).

Prior to the DMCA, a copyright owner would have had no cause of action against ***1196** anyone who circumvented any sort of technological control, but did not infringe. The DMCA rebalanced these interests to favor the copyright owner; the DMCA created circumvention liability for “digital trespass” under § 1201(a)(1). It also created trafficking liability under § 1201(a)(2) for facilitating such circumvention and under § 1201(b) for facilitating infringement (both subject to the numerous limitations and exceptions outlined throughout the DMCA).¹³

The importance of “rebalancing” interests in light of recent technological advances is manifest in the DMCA’s legislative history. Though the Supreme Court has recognized that interim industrial developments may erode the “persuasive effect of legislative history,” *New York v. FERC*, 535 U.S. 1, 23, 122 S.Ct. 1012, 152 L.Ed.2d 47 (2002), Congressional intent evident in relatively recent legislation like the DMCA may provide useful context in interpreting the statutory language. Though “we do not resort to legislative history to cloud a statutory text that is clear,” *Ratzlaf v. United States*, 510 U.S. 135, 147–48, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994), we nevertheless recognize that “words are inexact tools at best, and hence it is essential that we place the words of a statute in their proper context by resort to the legislative history.” *Tidewater Oil Co. v. United States*, 409 U.S. 151, 157, 93 S.Ct. 408, 34 L.Ed.2d 375 (1972).

The most significant and consistent theme running through the entire legislative history of the anticircumvention and anti-trafficking provisions of the DMCA, §§ 1201(a)(1),(2), is that Congress attempted to balance competing interests, and “endeavored to specify, with as much clarity as possible, how the right against anti-circumvention would be qualified to maintain balance between the interests of content creators and information users.” H.R.Rep. No. 105–551, at 26 (1998). The Report of the House Commerce Committee concluded that § 1201 “fully respects and extends into the digital environment

the bedrock principle of ‘balance’ in American intellectual property law for the benefit of both copyright owners and users.” *Id.*

The crux of the present dispute over statutory construction therefore stems from a dispute over the precise balance between copyright owners and users that Congress captured in the DMCA’s language.

Defendants argue ... that the DMCA should not be construed to reach their conduct [or product] ... because the DMCA, so applied, could prevent those who wish to gain access to technologically protected copyrighted works in order to make ... non-infringing use of them from doing so.... Technological access control measures have the capacity to prevent fair uses of copyrighted works as well as foul. Hence, there is a potential tension between the use of such access control measures and fair use, [as well as the much broader range of explicitly noninfringing use].... As the DMCA made its way through the legislative process, Congress was preoccupied with precisely this issue. Proponents of strong restrictions on circumvention of access control measures argued that they were *1197 essential if copyright holders were to make their works available in digital form because digital works otherwise could be pirated too easily. Opponents contended that strong anticircumvention measures would extend the copyright monopoly inappropriately and prevent many fair uses of copyrighted material. Congress struck a balance....

Reimerdes, 111 F.Supp.2d at 304 (citations omitted). We must understand that balance to resolve this dispute.

F. Access and Protection

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

Though as noted, circumvention *is not* a new form of infringement but rather a new

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

Chamberlain urges us to read the DMCA as if Congress simply created a new protection for copyrighted works without any reference at all either to the protections that copyright owners already possess or to the rights that the Copyright Act grants to the public. Chamberlain has not alleged that Skylink’s Model 39 infringes its copyrights, nor has it alleged that the Model 39 contributes to third-party infringement of its copyrights. Chamberlain’s allegation is considerably more straightforward: The only way for the Model 39 to interoperate with a Security+ GDO is by “accessing” copyrighted software. Skylink has therefore committed a per se violation of the DMCA. Chamberlain urges us to conclude that no necessary connection exists between access and *copyrights*. Congress could not have intended such a broad reading of the DMCA. *Accord Corley*, 273 F.3d at 435 (explaining that Congress passed the DMCA’s anti-trafficking provisions to help copyright owners protect their works *from piracy* behind a digital wall).

Chamberlain derives its strongest claimed support for its proposed construction *1198 from the trial court’s opinion in *Reimerdes*, a case involving the same statutory provision. *See Reimerdes*, 111 F.Supp.2d at 304. Though Chamberlain is correct in considering some of the *Reimerdes* language supportive, it is the differences between the cases, rather than their similarities, that is most instructive in demonstrating precisely what the DMCA permits and what it prohibits.

The facts here differ greatly from those in *Reimerdes*. There, a group of movie studios sought an injunction under the DMCA to prohibit illegal copying of digital versatile discs (DVDs). *Reimerdes*, 111 F.Supp.2d at 308. The plaintiffs presented evidence that each motion picture DVD includes a content scrambling system (CSS) that permits the film to be played, but not copied, using DVD players that incorporate the plaintiffs’ licensed decryption technology. *Id.* The defendant provided a link on his website that allowed an individual to download DeCSS, a program that allows the user to circumvent the CSS protective system and to view *or to copy* a motion picture from a DVD, whether or not the user has a DVD player with the licensed technology. *Id.* The defendant proudly

trumpeted his actions as “electronic civil disobedience.” *Id.* at 303, 312. The court found that the defendant had violated 17 U.S.C. § 1201(a)(2)(A) because DeCSS had only one purpose: to decrypt CSS. *Id.* at 319, 346.

Chamberlain’s proposed construction of the DMCA ignores the significant differences between defendants whose accused products enable copying and those, like Skylink, whose accused products enable only legitimate uses of copyrighted software. Chamberlain’s repeated reliance on language targeted at defendants trumpeting their “electronic civil disobedience,” *id.* at 303, 312, apparently led it to misconstrue significant portions of the DMCA. Many of Chamberlain’s assertions in its brief to this court conflate the property right of copyright with the liability that the anticircumvention provisions impose.

Chamberlain relies upon the DMCA’s prohibition of “fair uses ... as well as foul,” *Reimerdes*, 111 F.Supp.2d at 304, to argue that the enactment of the DMCA eliminated all existing consumer expectations about the public’s rights to use purchased products because those products might include technological measures controlling access to a copyrighted work. But Chamberlain appears to have overlooked the obvious. The possibility that § 1201 might prohibit some otherwise noninfringing public uses of copyrighted material, *see, e.g. RealNetworks, Inc. v. Streambox, Inc.*, No. 2:99CV02070, 2000 WL 127311, at *8, 2000 U.S. Dist. LEXIS 1889, at *23, (W.D.Wash., Jan.18, 2000); *Reimerdes*, 111 F.Supp.2d at 323, arises simply because the Congressional decision to create liability and consequent damages for making, using, or selling a “key” that essentially enables a *trespass* upon intellectual property need not be identical in scope to the liabilities and compensable damages for *infringing* that property; it is, instead, a rebalancing of interests that “attempt[s] to deal with special problems created by the so-called digital revolution.” *Aimster*, 334 F.3d at 655.

[The panel lists prior instances of DMCA liability in the lower courts, and notes that those cases all had some connection to copyright issues.]

Furthermore, though the severance of access from protection appears plausible taken out of context, it would also introduce a number of irreconcilable problems in statutory construction. The seeming plausibility arises because the statute’s structure could be seen to suggest that § 1201(b) strengthens a copyright owner’s abilities to protect its recognized *rights*, while § 1201(a) strengthens a copyright owner’s abilities to protect *access* to its work without regard to the legitimacy (or illegitimacy) of the actions that the accused access enables. Such an interpretation is consistent with the Second Circuit’s description: “[T]he focus of subsection 1201(a)(2) is circumvention of technologies designed to *prevent access* to a work, and the focus of subsection 1201(b)(1) is circumvention of technologies designed to *permit access* to a work but *prevent copying* of the work or some other act that infringes a copyright.” *Corley*, 273 F.3d at 440–41 (emphasis in original).

It is unlikely, however, that the Second Circuit meant to imply anything as drastic as wresting the concept of “access” from its context within the Copyright Act, as Chamberlain would now have us do. Were § 1201(a) to allow copyright owners to use technological measures to block *all* access to their copyrighted works, it would effectively create two distinct copyright regimes. In the first regime, the owners of a typical work protected by copyright would possess only the rights enumerated in 17 U.S.C. § 106, subject to the additions, exceptions, and limitations outlined throughout the rest of the Copyright Act—notably but not solely the fair use provisions of § 107.¹⁴ Owners who feel that technology has put those rights at risk, and who incorporate technological measures to protect those rights from technological encroachment, gain the additional ability to hold traffickers in circumvention devices liable under § 1201(b) for putting *1200 their rights back at risk by enabling circumventors who use these devices to infringe.

Under the second regime that Chamberlain’s proposed construction implies, the owners of a work protected by *both* copyright *and* a technological measure that effectively controls access to that work per § 1201(a) would possess *unlimited* rights to hold circumventors liable under § 1201(a) *merely for accessing that work*, even if that access enabled *only* rights that the Copyright Act grants to the public. This second implied regime would be problematic for a number of reasons. First, as the Supreme Court recently explained, “Congress’ exercise of its Copyright Clause authority must be rational.” *Eldred v. Ashcroft*, 537 U.S. 186, 205 n. 10, 123 S.Ct. 769, 154 L.Ed.2d 683 (2003). In determining whether a particular aspect of the Copyright Act “is a rational exercise of the legislative authority conferred by the Copyright Clause ... we defer substantially to Congress. It is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors ... *in order to give the public appropriate access* to their work product.” *Id.* at 204–05, 123 S.Ct. 769 (citation omitted) (emphasis added). Chamberlain’s proposed construction of § 1201(a) implies that in enacting the DMCA, Congress attempted to “give the public appropriate access” to copyrighted works by allowing copyright owners to deny all access to the public. Even under the substantial deference due Congress, such a redefinition borders on the irrational.

That apparent irrationality, however, is not the most significant problem that this second regime implies. Such a regime would be hard to reconcile with the DMCA’s statutory prescription that “[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.” 17 U.S.C. § 1201(c)(1). A provision that prohibited access without regard to the rest of the Copyright Act would clearly affect rights and limitations, if not remedies and defenses. Justice Souter has remarked that “[n]o canon of statutory construction familiar to me specifically addresses the situation in which two simultaneously enacted provisions of the same statute flatly contradict one another. We are, of course, bound to avoid such a dilemma if

we can, by glimpsing some uncontradicted meaning for each provision.” *Reno v. American–Arab Anti–Discrimination Comm.*, 525 U.S. 471, 509, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999) (Souter, J., dissenting). Chamberlain’s proposed construction of § 1201(a) would flatly contradict § 1201(c)(1)—a simultaneously enacted provision of the same statute. We are therefore bound, if we can, to obtain an alternative construction that leads to no such contradiction.

Chamberlain’s proposed severance of “access” from “protection” in § 1201(a) creates numerous other problems. Beyond suggesting that Congress enacted *by implication* a new, highly protective alternative regime for copyrighted works; contradicting other provisions of the same statute including § 1201(c)(1); and ignoring the explicit immunization of interoperability from anticircumvention liability under § 1201(f);¹⁵ the broad policy *1201 implications of considering “access” in a vacuum devoid of “protection” are both absurd and disastrous. Under Chamberlain’s proposed construction, explicated at oral argument, disabling a burglar alarm to gain “access” to a home containing copyrighted books, music, art, and periodicals would violate the DMCA; anyone who did so would unquestionably have “circumvent[ed] a technological measure that effectively controls access to a work protected under [the Copyright Act].” § 1201(a)(1). The appropriate deterrents to this type of behavior lie in tort law and criminal law, *not* in copyright law. Yet, were we to read the statute’s “plain language” as Chamberlain urges, disabling a burglar alarm would be a *per se* violation of the DMCA.

In a similar vein, Chamberlain’s proposed construction would allow any manufacturer of any product to add a single copyrighted sentence or software fragment to its product, wrap the copyrighted material in a trivial “encryption” scheme, and thereby gain the right to restrict consumers’ rights to use its products in conjunction with competing products.¹⁶ In other words, Chamberlain’s construction of the DMCA would allow virtually any company to attempt to leverage its sales into aftermarket monopolies—a practice that both the antitrust laws, *see Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 455, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992), and the doctrine of copyright misuse, *Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640, 647 (7th Cir.2003), normally prohibit.

* * *

Finally, the requisite “authorization,” on which the District Court granted Skylink summary judgment, points to yet another inconsistency in Chamberlain’s proposed construction. The notion of authorization is central to understanding § 1201(a). *See, e.g.*, S. Rep. 105–90 at 28 (1998) (“Subsection (a) applies when a person has not obtained authorized access to a copy or a phonorecord that is protected under the Copyright Act and for which the copyright owner has put in place a technological measure that effectively controls access to his or her work.”). Underlying Chamberlain’s argument on

appeal that it has not granted such authorization lies the necessary assumption that Chamberlain is entitled to prohibit legitimate purchasers of its embedded software from “accessing” the software by using it. Such an entitlement, however, would go far beyond the idea that the DMCA allows copyright owner to prohibit “fair uses ... as well as foul.” *Reimerdes*, 111 F.Supp.2d at 304. Chamberlain’s proposed construction would allow copyright owners to prohibit *exclusively fair* uses even in the absence of any feared foul use. It would therefore allow any copyright owner, through a combination of contractual terms and technological measures, to repeal the fair use doctrine with respect to an individual copyrighted work—or even selected copies of that copyrighted work. Again, this implication contradicts § 1201(c)(1) directly. Copyright law itself authorizes the public to make certain uses of copyrighted materials. Consumers who purchase a product containing a copy of embedded software have the inherent legal right to use that copy of the software. What the law authorizes, Chamberlain cannot revoke.¹⁷

Chamberlain’s proposed severance of “access” from “protection” is entirely inconsistent with the context defined by the total statutory structure of the Copyright Act, other simultaneously enacted provisions of the DMCA, and clear Congressional intent. *See Tidewater Oil*, 409 U.S. at 157, 93 S.Ct. 408. It “would lead to a result so bizarre that Congress could not have intended it.” *Central Bank*, 511 U.S. at 188, 114 S.Ct. 1439. The statutory structure and the legislative history both make it clear that the DMCA granted copyright holders additional legal protections, but neither rescinded the basic bargain granting the public noninfringing and fair uses of copyrighted materials, § 1201(c), nor prohibited various beneficial uses of circumvention technology, such as those exempted under §§ 1201(d),(f), (g), (j). *See Reimerdes*, 111 F.Supp.2d at 323.

We therefore reject Chamberlain’s proposed construction in its entirety. We conclude that 17 U.S.C. § 1201 prohibits only forms of access that bear a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners. While such a rule of reason ***1203** may create some uncertainty and consume some judicial resources, it is the only meaningful reading of the statute. Congress attempted to balance the legitimate interests of copyright owners with those of consumers of copyrighted products. *See* H.R.Rep. No. 105–551, at 26 (1998). The courts must adhere to the language that Congress enacted to determine how it attempted to achieve that balance. *See Gwaltney*, 484 U.S. at 56, 108 S.Ct. 376.

As we have seen, Congress chose to create new causes of action for circumvention and for trafficking in circumvention devices. Congress did not choose to create new property rights. That is the choice that we have identified. “It is not for us to resolve the issues of public policy implicated by the choice we have identified. Those issues are for Congress.” *Corley*, 273 F.3d at 458. Were we to interpret Congress’s words in a way that eliminated all balance and granted copyright owners carte blanche authority to preclude all use, Congressional intent would remain unrealized.

Congress chose words consistent with its stated intent to balance two sets of concerns pushing in opposite directions. *See* H.R.Rep. No. 105–551, at 26 (1998).¹⁸ The statute lays out broad categories of liability and broad exemptions from liability. It also instructs the courts explicitly *not* to construe the anticircumvention provisions in ways that would effectively repeal longstanding principles of copyright law. *See* § 1201(c).¹⁹ The courts must decide where the balance between the rights of copyright owners and those of the broad public tilts subject to a fact-specific rule of reason. Here, Chamberlain can point to no protected property right that Skylink imperils. The DMCA cannot allow Chamberlain to retract the most fundamental right that the Copyright Act grants consumers: the right to use the copy of Chamberlain’s embedded software that they purchased.

G. Chamberlain’s DMCA Claim

^[29] The proper construction of § 1201(a)(2) therefore makes it clear that Chamberlain cannot prevail. A plaintiff alleging a violation of § 1201(a)(2) must prove: (1) ownership of a valid *copyright* on a work, (2) effectively controlled by a *technological measure*, which has been circumvented, (3) that third parties can now *access* (4) *without authorization*, in a manner that (5) infringes or facilitates infringing a right *protected* by the Copyright Act, because of a product that (6) the defendant either (i) *designed or produced* primarily for circumvention; (ii) made available despite only *limited commercial significance* other than circumvention; or (iii) *marketed* for use in circumvention of the controlling technological measure. A plaintiff incapable of establishing any one of elements (1) through (5) will have failed to prove a prima facie case. A plaintiff capable of proving elements (1) through (5) need prove only one of (6)(i), (ii), or (iii) to shift the burden back to the defendant. At that point, the various affirmative defenses enumerated throughout § 1201 become relevant.

The District Court analyzed Chamberlain’s allegations in precisely the appropriate manner—a narrow focus on Skylink’s behavior, intent, and product within the broader context of longstanding expectations throughout the industry. The District Court assumed that Chamberlain met the first element, copyright *1204 ownership, and for the purposes of its summary judgment motions accepted Chamberlain’s evidence of the second element, technological access control. The District Court granted Skylink’s motion for summary judgment because Chamberlain failed to meet its burden on the fourth element, the lack of authorization. Chamberlain emphatically contests this conclusion on appeal, though mostly by reiterating arguments that the District Court correctly rejected.

Chamberlain, however, has failed to show not only the requisite lack of authorization, but also the necessary fifth element of its claim, the critical nexus between access and protection. Chamberlain neither alleged copyright infringement *nor explained how the access provided by the Model 39 transmitter facilitates the infringement of any right that the Copyright Act protects*. There can therefore be no reasonable relationship between the

access that homeowners gain to Chamberlain’s copyrighted software when using Skylink’s Model 39 transmitter and the protections that the Copyright Act grants to Chamberlain. The Copyright Act authorized Chamberlain’s customers to use the copy of Chamberlain’s copyrighted software embedded in the GDOs that they purchased. Chamberlain’s customers are therefore immune from § 1201(a)(1) circumvention liability. In the absence of allegations of either copyright infringement or § 1201(a)(1) circumvention, Skylink cannot be liable for § 1201(a)(2) trafficking. The District Court’s grant of summary judgment in Skylink’s favor was correct. Chamberlain failed to allege a claim under 17 U.S.C. § 1201.

CONCLUSION

The DMCA does not create a new property right for copyright owners. Nor, for that matter, does it divest the public of the property rights that the Copyright Act has long granted to the public. The anticircumvention and anti-trafficking provisions of the DMCA create new grounds of liability. A copyright owner seeking to impose liability on an accused circumventor must demonstrate a reasonable relationship between the circumvention at issue and a use relating to a property right for which the Copyright Act permits the copyright owner to withhold authorization—as well as notice that authorization was withheld. A copyright owner seeking to impose liability on an accused trafficker must demonstrate that the trafficker’s device enables either copyright infringement or a prohibited circumvention. Here, the District Court correctly ruled that Chamberlain pled no connection between unauthorized use of its copyrighted software and Skylink’s accused transmitter. This connection is critical to sustaining a cause of action under the DMCA. We therefore affirm the District Court’s summary judgment in favor of Skylink.

AFFIRM

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Footnotes

⁸ Two amici urging us to affirm raised additional arguments that warrant mention. Amicus Computer and Communications Industry Association (CCIA) urges us to consider the import of 1201(f), which explicitly allows circumvention for the purposes of achieving interoperability. Amicus Consumers Union (CU) urges us to consider the policy implications of Chamberlain’s proposed construction to consumers and to aftermarket competitors. According to CU, Chamberlain’s proposed construction of the DMCA would

enable copyright owners to engage in a number of practices that would otherwise be considered copyright misuse, an antitrust violation, or a violation of state unfair competition laws. At oral argument, Chamberlain conceded that its proposed construction would, indeed, alter virtually all existing consumer expectations concerning the public's rights to use purchased products containing copyrighted software protected by a technological measure—effectively confirming CUs fears.

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