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You Gotta Fight For Your Right To Repair: The Digital Millennium Copyright Act's Effect On Right-To-Repair Legislation

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YOU GOTTA FIGHT FOR YOUR RIGHT TO REPAIR: THE DIGITAL MILLENNIUM COPYRIGHT ACT'S EFFECT ON RIGHT-TO-REPAIR LEGISLATION

by: Daniel Moore*

ABSTRACT

Consumers are keeping their electronic devices longer today than in the past because the prices of the devices have increased. Increased prices have culminated in more consumers needing their devices repaired. In turn, manufacturers use the Digital Millennium Copyright Act, a federal law, and digital rights management to force consumers to get their devices repaired by either the device manufacturer or one of its authorized repairers. In response, states have considered right-to-repair laws which require manufacturers to make repair tools, equipment, and software available to device owners and independent repair shops. While almost half of the country's state legislatures have considered these bills, no state has enacted one fearing that the Digital Millennium Copyright Act will preempt any state's action on the issue. Critics of these bills argue that the bills conflict with federal law, and therefore, federal law preempts right-to-repair laws. However, this Article argues that the Digital Millennium Copyright Act would not preempt a state's right-to-repair law.

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I. INTRODUCTION

With the digital revolution currently in full swing, software is now the driving force behind technological innovation.¹ Many consumer-owned devices run on software. These devices include the obvious, such as cell phones² and computers,³ but software also helps to run many unexpected devices such as coffee makers⁴ and Barbie dolls.⁵ Most consumers believe that once they purchase a device it becomes their property. In truth, however, device manufacturers still have a considerable amount of ownership in the device. Manufacturers own copyright protections on the software that runs the device, which allows them to continue to exercise significant control over the device.

To protect their underlying copyrights on the software, copyright owners place digital rights management (“DRM”) technology on the devices they manufacture.⁶ DRM prevents consumers from modifying the underlying software that runs their device by controlling the types of interactions consumers have with their device.⁷ The Digital Millennium Copyright Act (“DMCA”) makes circumvention of DRM illegal.⁸ In some instances, device manufacturers use DRM and software to strong-arm consumers into getting their broken devices repaired by the device maker, rather than a repairer of the consumer’s choice. In response, some states have considered enacting so-called right-to-repair laws, or fair-repair laws. These laws require manufacturers to offer repair parts to independent repair shops, giving consumers the freedom to choose their repairer. When states considered these bills, there were concerns that the laws might run afoul of the DMCA and, therefore, be preempted by federal law.

1. Marc Andreessen, *Why Software Is Eating the World*, WALL ST. J. (Aug. 20, 2011), <https://www.wsj.com/articles/SB10001424053111903480904576512250915629460> [https://perma.cc/4CB3-A9TT].

2. See generally John Haubenreich, Note, *The iPhone and the DMCA: Locking the Hands of Consumers*, 61 VAND. L. REV. 1507 (2008).

3. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013).

4. See AARON PERZANOWSKI & JASON SCHULTZ, *THE END OF OWNERSHIP* 149–50 (2016) (explaining how the popular coffee maker, Keurig, used digital rights management to prevent its customers from being able to use rival companies’ coffee filters, resulting in intense public backlash and causing Keurig to change course).

5. Alyssa Newcomb, *Hello Barbie: Internet Connected Doll Can Have Conversations*, ABC NEWS (Feb. 17, 2015, 5:24 PM), <http://abcnews.go.com/Technology/barbie-internet-connected-doll-conversations/story?id=29026245> (explaining how new Barbie dolls can have conversations with the doll’s owner by connecting the doll to the internet and using an app).

6. E.g., Derek J. Schaffner, Note, *The Digital Millennium Copyright Act: Overextension of Copyright Protection and the Unintended Chilling Effects on Fair Use, Free Speech, and Innovation*, 14 CORNELL J.L. & PUB. POL’Y 145, 146 (2004).

7. See James Grimmelman, Note, *Regulation by Software*, 114 YALE L.J. 1719, 1751–52 (2005). See generally PERZANOWSKI & SCHULTZ, *supra* note 4, at 121–39 (defining DRM as the technologies used by copyright holders to control how consumers use their content).

8. See 17 U.S.C. § 1201 (2012).

This Article explains why the DMCA will not preempt right-to-repair laws. This Article proceeds in four Sections. Section II discusses the DMCA, and what actions it prohibits.⁹ Section III explains the problem with the DMCA, the solution offered by right-to-repair laws, and concerns state legislatures have regarding the potential conflict with federal copyright law.¹⁰ Section IV applies preemption doctrine to right-to-repair laws.¹¹ Finally, Section V examines the policy implications of right-to-repair laws.¹²

II. THE DIGITAL MILLENNIUM COPYRIGHT ACT

Congress enacted the DMCA¹³ in 1998 to implement the World Intellectual Property Organization (“WIPO”) Treaty, which the United States agreed to in 1996.¹⁴ The Treaty requires signatory parties to provide legal protection against circumventing technological measures that protect copyrighted works.¹⁵ Although some have suggested the U.S. did not need to pass a new law to enforce the WIPO Treaty, Congress enacted the DMCA to implement it.¹⁶

The DMCA creates three liability provisions.¹⁷ First, § 1201(a)(1) prohibits “circumvent[ion] [of] a technological measure that effectively controls access to a work protected” by copyright.¹⁸ Second, § 1201(a)(2) prohibits the trafficking of technology that circumvents “a technological measure that effectively *controls access to* a [copyrighted] work”¹⁹ Third, § 1201(b)(1) prohibits the trafficking of technology that circumvents “protection afforded by a technological

9. See *infra* notes 13–31 and accompanying text.

10. See *infra* notes 32–70 and accompanying text.

11. See *infra* notes 71–261 and accompanying text.

12. See *infra* notes 262–70 and accompanying text.

13. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

14. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 440 (2d Cir. 2001); H.R. REP. NO. 105-551, pt. 1, at 9 (1998).

15. *Universal City Studios*, 273 F.3d at 440 (citing World Intellectual Property Organization Treaty art. 11, Apr. 12, 1997, S. TREATY DOC. NO. 105-17, 2186 U.N.T.S. 121).

16. Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095, 1103 (2003) (arguing that when the United States signed the WIPO Treaty, the doctrine of contributory infringement already provided adequate legal protections to copyright owners, and no new congressional act was necessary to comply with the Treaty).

17. See 17 U.S.C. § 1201 (2012).

18. *Id.* § 1201(a)(1). In this subsection, circumvention of a technological measure means to “descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.” *Id.* § 1201(a)(3)(A).

19. *Id.* § 1201(a)(2) (emphasis added). In its interpretation of the DMCA, however, the Ninth Circuit did not recognize a claim under section 1201(a)(2). *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 944 (9th Cir. 2010). The Ninth Circuit held there were “two distinct types of claims” under the DMCA. The first was the anti-circumvention provision found in § 1201(a), and the second was the anti-trafficking provision found in § 1201(b)(1). *Id.*

measure that effectively *protects a right of a copyright owner . . .*”²⁰ Thus, the DMCA makes it illegal to circumvent DRM or traffic in tools that enable circumvention.

To illustrate, consider circumvention as a home invasion. Section 1201(a)(1) is equivalent to the prohibition against breaking into another’s home.²¹ The invasion of another’s home is the crime. Similarly, § 1201(a)(2) penalizes trafficking tools—such as lock picks—used to break into another’s home.²² Section 1201(b), however, is significantly different than the first two prohibitions. Section 1201(b) is the equivalent of a guest who has been invited into a home, but once inside, the guest violates the homeowner’s rules, refuses to leave, and thereby trespasses.²³

The above examples show the slight distinction between §§ 1201(a)(2) and 1201(b), but the rights that each section protects are markedly different. While it is easier to show these distinctions when discussing non-copyright law violations, applied in their proper context, the slight distinctions become more difficult to illuminate.

As applied to copyright issues, § 1201(a)(1) prohibits a person from breaking into a copyrighted work that technology locks out.²⁴ For example, a movie studio can encrypt a DVD, only allowing the public to play—but not copy—the movie. If a person decrypts that DVD, the person would be liable under the DMCA.²⁵ The reason for decrypting the DVD would not matter; it is the act of circumvention that makes one liable.²⁶ Thus, intent does not matter; a person who decrypts a DVD to skip previews or save clips for educational purposes would be just as liable as one who decrypts a DVD for more sinister reasons.²⁷

Using the same example, a person would be liable under § 1201(a)(2) if a person trafficked the decryption device. For example, a person would be liable if he or she placed a downloadable file on the internet that allows anyone with the file to decrypt DVDs.²⁸

Likewise, a person would be liable under § 1201(b) if the person trafficked a product that circumvents a technological measure that protects a copyrighted work. But unlike § 1201(a), the act of circumvention does not create liability, as there is no equivalent to

20. 17 U.S.C. § 1201(b)(1)(A) (emphasis added).

21. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12a.03(D) (2017).

22. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 329 (S.D.N.Y. 2000), *aff’d sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (comparing the anti-trafficking provision to laws that prohibit the possession of burglar tools); 4 NIMMER & NIMMER, *supra* note 21, §12A.03(D)(1).

23. 4 NIMMER & NIMMER, *supra* note 21, §12A.03(D)(2).

24. *Id.* § 12A.03(A)(1).

25. *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 300 (3d Cir. 2011).

26. *Reimerdes*, 111 F. Supp. 2d at 319.

27. *See Perzanowski & Schultz*, *supra* note 4, at 132.

28. *See Universal City Studios*, 111 F. Supp. 2d at 316.

§ 1201(a)(1) for rights control.²⁹ For example, a person who buys an eBook gets a version of the book but with several restrictions that a physical book would not have.³⁰ Trafficking a device that removes these restrictions violates § 1201(b).³¹

III. STATES' RESPONSES

A. *The Need for Right-to-Repair Acts*

Copyright owners use the DMCA and DRM to protect their copyrights.³² In essence, copyright owners use DRM to limit the access consumers have to the copyright—the underlying software that runs the device.³³

Companies that use this technology reason that by buying a device, a consumer does not acquire the software, nor is the consumer the new software owner.³⁴ And, without DRM, a consumer would have unfettered access to the software and could modify it, which could affect the device's safety, control, security, and functionality. Therefore, these companies use DRM to “protect against the unauthorized reproduction and destruction of [their] copyrighted works.”³⁵

Preventing modification of copyrighted software makes sense to a degree. For example, John Deere, in support of its contention that manufacturers need DRM to prevent modification of vehicle makers' copyrighted software, noted that such modifications have safety and security implications. John Deere argued modification could result in vehicles acting unexpectedly, which could cause traffic accidents and personal injuries and result in non-compliance with safety and vehicle emissions regulations.³⁶ Likewise, Apple claimed modifications to its software would raise safety and security concerns. The iPhone's iOS software is designed to shut the phone down if it overheats, and it stops the charging process once the phone is fully charged.³⁷ Further,

29. See 17 U.S.C. § 1201(b) (2012); R. Anthony Reese, *Will Merging Access Controls and Rights Controls Undermine the Structure of Anticircumvention Law?*, 18 BERKELEY TECH. L.J. 619, 623 (2003).

30. See Perzanowski & Schultz, *supra* note 4, at 1–3.

31. See *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002) (holding a company that trafficked in software that allowed consumers to remove restrictions placed on eBooks violated § 1201(b)).

32. See Schaffner, *supra* note 6, at 146.

33. *Id.*

34. Darin Bartholomew & John Deere, *Long Comment Regarding a Proposed Exemption Under 17 U.S.C. 1201*, COPYRIGHT OFF. 4, https://www.copyright.gov/1201/2015/comments-032715/class%202022/John_Deere_Class22_1201_2014.pdf (last visited Mar. 2, 2018) [<https://perma.cc/MJZ4-Q336>].

35. *Id.* at 3.

36. *Id.* at 2.

37. David L. Hayes & Apple, *Responsive Comment of Apple Inc. in Opposition to Proposed Exemption 5A and 11A (Class #1)*, COPYRIGHT OFF. 8, available at <https://www.copyright.gov/1201/2008/responses/apple-inc-31.pdf> (last visited Mar. 2, 2018) [<https://perma.cc/7Y7W-R5P5>].

iOS requires programs to run in certain ways to prevent the phone from getting viruses or opening security holes, which would allow hackers to get information from the phone.³⁸ John Deere and Apple maintain that without DRM, consumers can modify the software to remove the built-in safety systems, making the device unsafe.

However, manufacturers also use DRM and the DMCA to prevent consumers from fixing their broken devices. The software that runs these devices can recognize when a non-genuine part replaces a broken part.³⁹ Manufacturers can design the software to shut down the device after recognizing the non-genuine part.⁴⁰ Any attempt to modify the software to make the device operable again violates the DMCA.

For example, in 2016, consumers who replaced broken iPhone parts with non-genuine Apple parts received an error when updating their phones to iOS 9.⁴¹ For a time, consumers who received this error no longer had functioning phones; their phones were “bricked”—meaning they were functionally equivalent to a brick.⁴² This error affected all iPhone 6 users that had their home button repaired by a repairer other than Apple.⁴³ Eventually, after public backlash, Apple released a software update that resolved the error.⁴⁴ Although the error was resolved, Apple, in a not-so-subtle way, warned its customers: Do not use non-genuine Apple parts to fix your device, or else.

The update to iOS 9 was not the only iOS update that caused headaches for consumers who had their phones fixed with non-genuine parts. In 2017, Apple—once again—released an update to iOS 11 that fixed an issue that some consumers experienced after having their phones fixed with non-genuine parts.⁴⁵ But this time, Apple provided an express warning:

38. *Id.*

39. See Jason Koebler, *Latest iOS Update Shows Apple Can Use Software to Break Phones Repaired by Independent Shops*, VICE (Oct. 13, 2017, 2:24 PM), https://motherboard.vice.com/en_us/article/bjv9jz/apple-ios-11-repair-screens-software-update [<https://perma.cc/S4LH-W4UP>].

40. *Id.*

41. Buster Hein, *Everything You Need to Know About iOS' Crippling 'Error 53'*, CULT OF MAC (Feb. 9, 2016, 2:30 PM), <https://www.cultofmac.com/411395/everything-you-need-to-know-about-ios-crippling-error-53/> [<https://perma.cc/35CL-QHM8>].

42. Miles Brignall, *'Error 53' Fury Mounts as Apple Software Update Threatens to Kill Your iPhone 6*, GUARDIAN (Feb. 5, 2016, 1:59 PM), <https://www.theguardian.com/money/2016/feb/05/error-53-apple-iphone-software-update-handset-worthless-third-party-repair> [<https://perma.cc/48UK-N7CM>].

43. Hein, *supra* note 41. Those in the repair industry said that the error affected more than just phones that had their home buttons repaired. They said the error also affected users who had their phone screens replaced. *Id.*

44. Juli Clover, *Apple Releases Updated Version of iOS 9.2.1 to Fix Devices Bricked by 'Error 53'*, MACRUMORS (Feb. 18, 2016, 10:19 AM), <https://www.macrumors.com/2016/02/18/apple-ios-9-2-1-error-53-fix/> [<https://perma.cc/J6F2-96S3>].

45. Koebler, *supra* note 39.

Note: Non-genuine replacement displays may have compromised visual quality and may fail to work correctly. Apple-certified screen repairs are performed by trusted experts who use genuine Apple parts. See support.apple.com for more information.⁴⁶

Although expressly stated, the message was the same: Do not let anyone other than Apple work on your iPhone.

Using software locks to stop consumers from getting their devices repaired by anyone other than the manufacturer is not unique to Apple or the phone industry. John Deere uses software that requires its tractors to be fixed by one of its technicians at one of its dealerships.⁴⁷ Likewise, makers of household appliances, such as refrigerators and air-conditioners, include these locks on devices they manufacture.⁴⁸

B. Introduction of Right-to-Repair Acts

Since 2015, states have responded to consumers' lack of freedom to choose how to fix their devices by trying to enact right-to-repair laws.⁴⁹ These laws require manufacturers to offer repair instructions and parts to independent repair technicians.⁵⁰ During the legislative sessions following the 2016 elections, almost half of the country's state legislatures considered right-to-repair laws.⁵¹ Although no state has

46. *Id.*

47. Jason Koebler, *Why American Farmers Are Hacking Their Tractors With Ukrainian Firmware*, VICE (Mar. 21, 2017, 3:17 PM), https://motherboard.vice.com/en_us/article/xykkkd/why-american-farmers-are-hacking-their-tractors-with-ukrainian-firmware [https://perma.cc/85SR-HZ6K].

48. Jason Koebler, *The iPhone 7 Has Arbitrary Software Locks That Prevent Repair*, VICE (Apr. 7, 2017, 10:02 AM), https://motherboard.vice.com/en_us/article/kbjm8e/iphone-7-home-button-unreplaceable-repair-software-lock [https://perma.cc/K9V3-7XLY].

49. In February 2015, the Minnesota House and Senate, and the New York Senate introduced right to repair bills. See Minnesota's S.F. 873, 2015 Leg., 89th Sess. (Minn. 2015); H.R. 1048, 2015 Leg., 89th Sess. (Minn. 2015); S.B. 3998, 2015–2016 Leg., Reg. Sess. (N.Y. 2015).

50. Karen Turner, *Apple Wants to Kill a Bill That Could Make It Easier for You to Fix Your iPhone*, WASH. POST (June 17, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/06/17/apple-wants-to-kill-a-bill-that-could-make-it-easier-for-you-to-fix-your-iphone/?utm_term=.cd73d566505d [https://perma.cc/DZX5-EB7S].

51. The states are California, Hawaii, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Tennessee, Vermont, Virginia, Washington, and Wyoming. Assemb. B. 2110, 2017–2018 Gen. Assemb., Reg. Sess. (Cal. 2018); H.B. 1649, 2018 Leg., 29th Sess. (Haw. 2018); H.B. 3030, 100th Gen. Assemb., Reg. Sess. (Ill. 2017); H. File 556, 87th Gen. Assemb., Reg. Sess. (Iowa 2017); H.B. 2122, 2017 Leg., Reg. Sess. (Kan. 2017); S.B. 96, 119th Gen. Assemb., Reg. Sess. (Mass. 2017); H.B. 143, 119th Gen. Assemb., Reg. Sess. (Mass. 2017); S.F. 15, 2017 Leg., 90th Sess. (Minn. 2017); H.R. 287, 2017 Leg., 90th Sess. (Minn. 2017); H.B. 1178, 99th Gen. Assemb., 1st Reg. Sess. (Mo. 2017); Legis. B. 67, 150th Leg., 1st Sess. (Neb. 2017); H.B. 1733, 2018 Leg., Reg. Sess. (N.H. 2018); Assemb. B. 4934, 217th Leg., Reg. Sess. (N.J. 2017); S.B. 618, 2017–2018 Leg., Reg. Sess. (N.Y. 2017); Assemb. B. 8192, 2017–2018 Leg., Reg. Sess. (N.Y. 2017); H.B. 663, 2017 Gen. Assemb., Reg. Sess. (N.C. 2017); H.B. 2551, 56th

yet enacted this type of law, each year state legislatures proceed further in the legislative process than they did during previous legislative sessions.⁵²

Each state's version of the right-to-repair bill is slightly different, but the goals and overall statutory schemes are similar. Generally, the bills require manufacturers to do three things. First, manufacturers must make repair information, diagnostic software, updates to firmware, and similar items available to independent repair facilities free of charge.⁵³ Second, manufacturers must also make repair parts available for sale to the owner of the device.⁵⁴ Third, manufacturers must make repair tools available for sale to independent repair facilities.⁵⁵ Further, most bills clarify that once a manufacturer provides the information, parts, and tools, they are no longer responsible for the devices' functionality.⁵⁶ Most versions do not require a manufacturer to divulge a trade secret to comply with the bill, end any contract that a manufacturer might have with an authorized repairer, or provide any information beyond what the bill expressly mandates.⁵⁷

Despite the similar goals and schemes, there are some differences between each state's version. The versions considered by the Kansas and Wyoming legislatures only applied to farming equipment, while other states' versions applied to electronic devices generally.⁵⁸ Many states have expressly excluded motor vehicles from their bills,⁵⁹ and others have excluded medical devices.⁶⁰ Legislatures likely excluded these devices because they intend for the bills to apply to small con-

Leg., 2nd Sess. (Okla. 2018); S.B. 888, 2017 Gen. Assemb., Reg. Sess. (Tenn. 2017); H.B. 1382, 2017 Gen. Assemb., Reg. Sess. (Tenn. 2017); S.B. 180, 2018 Leg., Reg. Sess. (Vt. 2018); H.B. 20, 2018 Leg., 2018 Sess. (Va. 2018); H.B. 2279, 65th Leg., 2018 Reg. Sess. (Wash. 2018); H.B. 199, 2017 Leg., Reg. Sess. (Wyo. 2017).

52. See, e.g., Legis. B. 67, 105th Leg., 1st Sess. (Neb. 2017) (receiving a committee hearing); H.B. 2279, 65th Leg., Reg. Sess. (Wash. 2018) (passing out of the Technology & Economic Development Committee); H.B. 199, 64th Leg., Reg. Sess. (Wyo. 2017) (passing out of the Agriculture, State and Public Lands and Water Resources Committee).

53. See, e.g., Leg. B. 67, 105th Leg., 1st Sess. § 3 (Neb. 2017); Assemb. B. 8192, 2017–2018 Leg., Reg. Sess. § 2 (N.Y. 2017).

54. See, e.g., H.B. 1649, 29th Leg., 29th Sess. § 3 (Haw. 2018); H.R. 287, 2017 Leg., 90th Sess. § 1 (Minn. 2017).

55. See, e.g., H.B. 2122, 2017 Leg., 87th Sess. § 3 (Kan. 2017); H.B. 143, 190th Gen. Assemb., Reg. Sess. § 4 (Mass. 2017).

56. See, e.g., H.B. 2551, 56th Leg., 2d Sess. § 3 (Okla. 2018); H.B. 199, 64th Leg., Reg. Sess. § 1 (Wyo. 2017).

57. See, e.g., H.F. 556, 87th Gen. Assemb., Reg. Sess. § 2 (Iowa 2018); H.B. 2279, 65th Leg., Reg. Sess. § 4 (Wash. 2018).

58. Compare H.B. 2122, 87th Leg., Reg. Sess. (Kan. 2017) (applying to farm equipment), and H.B. 199, 64th Leg., Reg. Sess. (Wyo. 2017) (applying to farm equipment), with, e.g., H.B. 663, 2017–2018 Gen. Assemb., Reg. Sess. (N.C. 2017) (applying to any digital electronic product that contains a microprocessor).

59. See, e.g., H.B. 3030, 100th Gen. Assemb., Reg. Sess. § 40 (Ill. 2017). But see, e.g., H.B. 1178, 99th Gen. Assemb., Reg. Sess. § A (Mo. 2017).

60. See, e.g., H.B. 20, 2018 Gen. Assemb., Reg. Sess. § 574 (Va. 2018). But see, e.g., S.B. 888, 110th Gen. Assemb., Reg. Sess. (Tenn. 2017).

sumer electronic devices such as cell phones. Legislatures likely found John Deere's argument that application to motor vehicles can cause traffic accidents, personal injuries, and non-compliance with vehicle emissions compelling. So, out of an abundance of caution, some states have excluded motor vehicles, medical devices, or both.

C. Preemption Concerns

When state legislative committees began to hear right-to-repair bills, one of the primary concerns expressed by legislators, industry groups who opposed the bills, and supporters of the bills was the impact that federal copyright law would have on the bills—specifically the DMCA.⁶¹ For example, prior to the Wyoming Agriculture Committee's vote in favor of their version of the law, committee members discussed federal copyright law.⁶² Likewise, opponents to the Washington version warned that the bill “may violate federal copyright protections.”⁶³

Similarly, when the Nebraska right-to-repair bill went before the unicameral's Judiciary Committee, senators and interested parties expressed concern about federal copyright law's impact on the bill. One Committee member questioned why the bill's proponents were coming to the Nebraska legislature for relief. He opined that the proponents “might be coming to the wrong place for [a] resolution,” and instead they should lobby Congress.⁶⁴ That Committee member went on to say, “a federal solution is what [the bill's proponents] ought to be looking at.”⁶⁵

Representatives of the technology industry testified before the Committee and expressed concerns that the bill would endanger their copyrights and conflict with the DMCA. The Entertainment Software Association, a trade association for the video game industry, opposed

61. The Nebraska bill was one of the first bills to receive a committee hearing, and the Nebraska Legislature is the only state to have transcripts of the committee hearing publicly available. Therefore, this subsection will go into greater detail on the Nebraska committee hearing. However, the comments made before the Nebraska committee were similar to the comments made before other states' committees that considered these bills. Further, I interviewed several legislators from other states who sat on committees that heard their state's version of the bill. Information gleaned from these interviews is also discussed.

62. Telephone Interview with Hans Hunt, Chairman of the House Agric., State & Pub. Lands, & Water Res. Comm., Wyo. Leg. (Oct. 15, 2017). However, the impact federal copyright law may have on the Wyoming bill was not a primary concern of the committee because the Wyoming bill was narrowly tailored to farming equipment and the Library of Congress exempts farming equipment. See 37 C.F.R. § 201.40(b)(6) (2017).

63. Letter from CompTIA to Jeff Morris, Chair of the Wash. House Tech. & Econ. Dev. Comm. (Jan. 8, 2018) (on file with Wash. House Tech. & Econ. Dev. Comm.).

64. *Hearing on L.B. 67 Before the Judiciary Comm.*, 105th Leg., 1st Sess. 42 (Neb. 2017) [hereinafter *Nebraska Hearing*] (statement of Sen. Ernie Chambers, Member, Judiciary Comm.).

65. *Id.*

the bill and argued it would “create some very complicated conflicts with U.S. copyright law.”⁶⁶ Additionally, the Computing Technology Industry Association, an IT trade group, opposed the bill and was much blunter in its assessment of the DMCA’s impact on the bill. The group said the bill would bring U.S. copyright law into a gray area and risk violating the DMCA.⁶⁷

Finally, proponents of the bill explained to the Committee how current laws adversely affect their ability to operate small, independent repair shops. The owner of an independent repair shop explained how he made videos showing how to repair Apple devices and placed the videos on the internet.⁶⁸ Apple threatened to sue the owner of the repair shop unless he removed the videos from the internet.⁶⁹ He removed the videos after he consulted with an attorney who informed him that Apple had a potentially viable copyright claim against him.⁷⁰

IV. FEDERAL PREEMPTION OF RIGHT-TO-REPAIR LAWS

In our system of federalism, the states and the federal government each have their own power that the other must respect.⁷¹ There can be times, however, where a state and the federal government have laws that conflict. The Supremacy Clause of the U.S. Constitution provides a resolution to these conflicts.⁷² The Supremacy Clause states that federal law is “the supreme Law of the Land”; therefore, federal law preempts state law.⁷³ Preemption is the process by which a state law in conflict with a federal law becomes invalidated.⁷⁴

Preemption can be express or implied.⁷⁵ Express preemption occurs when a statute’s language expressly preempts state law.⁷⁶ Implied pre-

66. *Id.* at 44 (statement of Michael Warnecke, Representative, Entertainment Software Association).

67. *Id.* at 43 (statement of Alexi Madon, Representative, Computing Technology Industry Association).

68. *Id.* at 12–13 (statement of Louis Rossmann, Owner, Rossmann Repair Group); see also Ben Lovejoy, *Bad Month for Apple Repairs as Tekserve to Close, Louis Rossmann Videos Likely to Disappear*, 9TO5 MAC (Jul. 1, 2016, 4:15 AM), <https://9to5mac.com/2016/07/01/tekserve-closure-louis-rossman-videos/> [<https://perma.cc/9K7L-PE57>].

69. *Nebraska Hearing*, *supra* note 64, at 13 (statement of Louis Rossmann, Owner, Rossmann Repair Group).

70. *Id.*

71. *Arizona v. United States*, 567 U.S. 387, 399 (2012). See also *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1475 (2018) (“[B]oth the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of ‘dual sovereignty.’”).

72. See U.S. CONST. art. VI. cl. 2.

73. *Id.*

74. See *Murphy*, 138 S. Ct. at 1476 (“This means that when federal and state law conflict, federal law prevails, and state law is preempted.”).

75. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (plurality opinion).

76. *Id.* at 99.

emption includes field and conflict preemption.⁷⁷ Field preemption occurs when Congress has left no room for the states to regulate in the field.⁷⁸ Conflict preemption occurs in two ways: (1) when “compliance with both federal and state regulation is a physical impossibility,” or (2) when a state’s law is an obstacle to the federal objective.⁷⁹ Thus, the U.S. Supreme Court has recognized three ways federal law can preempt, and therefore nullify, state law: express preemption, field preemption, and conflict preemption.⁸⁰

Congress enacted § 301 (“Copyright Preemption Statute”) of the Copyright Act of 1976 (“Copyright Act”), which expressly preempts all other state and common law copyright claims.⁸¹ Since Congress passed the Copyright Preemption Statute, courts typically do not address field or conflict preemption when determining if the Copyright Act preempts a state law.⁸² This lack of court attention is likely because courts presume the Copyright Preemption Statute encompasses the Act’s full preemptive effects.⁸³ Therefore, this Article focuses on express preemption.⁸⁴

The Copyright Preemption Statute of the Copyright Act expressly preempts state law if the state law: (1) falls within the scope of copyright subject matter; and (2) grants rights “equivalent to any of the exclusive rights within the general scope of copyright.”⁸⁵

Combining the DMCA and the Copyright Preemption Statute’s vast preemptive effects will not preempt a right-to-repair law. First, state legislatures do not intend for right-to-repair laws to be copyright laws. Second, Congress did not intend the DMCA to be a copyright law. The Copyright Preemption Statute, therefore, does not apply to the DMCA and is unable to preempt state laws. Third, even if the DMCA can preempt state laws, the Copyright Preemption Statute cannot preempt right-to-repair laws because they contain additional elements. Finally, the doctrine of implied preemption will not preempt a right-to-repair law. Each of these points will be further examined.

77. *Id.* at 98.

78. *See Arizona v. United States*, 567 U.S. 387, 399 (2012).

79. *Id.* at 399–400.

80. *Gade*, 505 U.S. at 98; *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992); *accord Arizona*, 567 U.S. at 398–400.

81. *See* 17 U.S.C. § 301 (2012).

82. Christina Bohannon, *Copyright Preemption of Contracts*, 67 MD. L. REV. 616, 623 (2008).

83. *Id.*

84. This Article addresses implied preemption only to refute claims that right-to-repair laws could be either field or conflict preempted.

85. 17 U.S.C. § 301; *Ryan v. Editions Ltd. W.*, 786 F.3d 754, 760 (9th Cir. 2015); *accord Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424, 429 (2d Cir. 2012); *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 453 (6th Cir. 2001).

A. *State Legislatures' Intent*

Right-to-repair laws are beyond the scope of the Copyright Preemption Statute because they are consumer-protection-laws—not copyright laws. Virtually all state legislatures that have considered right-to-repair laws have correctly considered them as consumer protection laws. Therefore, right-to-repair laws are not subject to the Copyright Preemption Statute's preemptive effects.

The fact that right-to-repair laws are consumer-protection laws is evident in several ways. First, legislatures referred right-to-repair bills to committees with jurisdiction over consumer-protection-type laws. For example, the legislatures from Nebraska, Vermont, and Wyoming referred their bills to the Judiciary Committee, the Committee on Economic Development, Housing, and General Affairs, and the Agriculture, State, and Public Lands and Water Resources Committee, respectively, where they each received committee hearings.⁸⁶

Second, these bills amend or add to parts of the codes or titles that govern consumer protection. For example, the Wyoming version adds a new section in the Farm and Ranch Operations Chapter of the Agriculture, Livestock, and Other Animals Title.⁸⁷ Likewise, the New York version adds a new section in the Miscellaneous Article of the General Business Law Code,⁸⁸ and the North Carolina version adds a new Article to the Monopolies, Trusts, and Consumer Protection Chapter.⁸⁹ Therefore, state legislatures intend right-to-repair laws to be consumer-protection laws.

Protecting citizens from unfair trade practices by enacting consumer-protection laws is a traditional police power of the states, not of the federal government.⁹⁰ Thus, courts give states more deference when construing preemption principles of a state consumer protection law than a non-traditional, police-power state law. In *Florida Lime*, the U.S. Supreme Court upheld a state statute based on this presumption.⁹¹ In that case, the U.S. Department of Agriculture's regulations allowed farmers to pick South Florida avocados once they had matured.⁹² The federal law based its test for maturity on a schedule of

86. See, e.g., LEG. JOURNAL, 150th Leg., 1st. Sess., at 86 (Neb. 2017); S. JOURNAL, 2018 Leg. Sess., at 16 (Vt. 2018); H. JOURNAL, 64th Leg., Gen. Sess., at 323 (Wyo. 2017). But see H. Journal, 99th Gen. Assemb., 1st Sess., at 2790 (Mo. 2017) (referred to Select Committee on Local, State, Federal Relations, and Miscellaneous Business); H. JOURNAL, 87th Leg., Reg. Sess., at 98 (Kan. 2017) (referred to Committee on Federal and State Affairs).

87. H.B. 199, 2017 Gen. Sess., 64th Leg. § 1 (Wyo. 2017).

88. S.B. 618, 239th Gen. Assemb., Reg. Sess. § 1 (N.Y. 2017); H.B. 8192, 239th Gen. Assemb., Reg. Sess. §1 (N.Y. 2017).

89. H.B. 663, Gen. Assemb., 2017 Sess. § 1 (N.C. 2017).

90. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 36 n.19 (2007) (Stevens, J., dissenting); *Castro v. Collecto, Inc.*, 634 F.3d 779, 784–85 (5th Cir. 2011); *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41–42 (2d Cir. 1990).

91. See *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 156 (1963).

92. *Id.* at 139.

picking dates.⁹³ California law, on the other hand, prohibited the sale of avocados with less than 8% of oil by weight.⁹⁴

The Court determined that the California law was a food safety law—a traditional power of the states.⁹⁵ With this determination in mind, the Court narrowly interpreted the federal regulation’s preemptive effects on the California law.⁹⁶ The Court construed the federal regulations to apply to the “picking, processing, and transporting of” avocados, while the state law regulated the marketing of avocados.⁹⁷ The Court noted that just because Congress regulates on one end of the stream of commerce, that does not preclude a state from regulating at the other end.⁹⁸

Thus, right-to-repair laws are consumer protection laws, which are a traditional state police power. And, as the Supreme Court has noted many times, in all preemption cases, courts “start with the assumption that the historic police power of the States [are] not to be superseded by [f]ederal [a]ct unless [it is] the clear manifest purpose of Congress.”⁹⁹ Thus, federal law’s preemptive effects are narrowly construed when the state law in question is an exercise of the state’s traditional police power. Further, Congress’s “regulation[s] at of one end of the stream of commerce does not [foreclose] . . . state regulation at the other end.”¹⁰⁰

Narrowly interpreting the federal regulation’s preemptive effect on right-to-repair laws would lead to the same result as in *Florida Lime*—that the state law is not preempted. Much like the California law, right-to-repair laws and federal regulations operate on opposite ends of the stream of commerce spectrum. The DMCA regulates on the manufacturing side of the stream of commerce, while right-to-repair laws regulate on the repair side. The DMCA’s regulations on the manufacturing side of the stream of commerce do not preempt right-to-repair regulations on the repair side of the stream of commerce. Therefore, the Copyright Preemption Statute does not preempt a right-to-repair law.

B. Congress’s Intent to Preempt

Congress’s intent is the key in all preemption cases.¹⁰¹ Even when Congress has enacted a statute that expressly preempts state law, courts look at Congress’s intent to determine the full power of the

93. *Id.*

94. *Id.* at 133.

95. *Id.* at 144.

96. *See id.* at 145.

97. *Id.*

98. *Id.*

99. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

100. *Fla. Lime*, 373 U.S. at 145.

101. *Wyeth*, 555 U.S. at 565.

statute's preemptive effect.¹⁰² Thus, in express preemption cases, the courts focus on the language of the preemption statute because it is the best evidence of Congress's intent.¹⁰³

The Copyright Preemption Statute preempts all state copyright claims, which shows Congress intended a uniform copyright system. However, Congress did not intend the Copyright Preemption Statute to apply to the DMCA because Congress did not intend the DMCA to be a copyright law. The DMCA's anti-circumvention provision lacks the characteristics of traditional copyright laws and can be more accurately described as an anti-hacking law.¹⁰⁴ Although the short title of the Act describes it as a copyright act, that description is not dispositive.¹⁰⁵ Indeed, the DMCA's legislative history shows that Congress did not intend a new copyright law.

The WIPO Treaty required signatory nations to provide "adequate legal protection[s] . . . against the circumvention of effective technological measures."¹⁰⁶ At the time, U.S. copyright law already protected against circumvention, so much so that the Clinton administration originally planned to submit the Treaty to the Senate without implementing legislation.¹⁰⁷ However, content-owning industry groups saw the WIPO Treaty and an implementing act as a way to expand their copyright protection.¹⁰⁸ Nevertheless, Congress ultimately passed implementing legislation—the DMCA—and content-owning industry groups successfully lobbied Congress to enact an anti-circumvention provision beyond the requirements of the treaty.¹⁰⁹

When Congress considered H.R. 2281, the bill that ultimately became the DMCA, Congress acknowledged that questions existed regarding whether the bill was a traditional copyright law.¹¹⁰ Congress referred H.R. 2281 to both the House Committee on the Judiciary and

102. See Chamber of Commerce of U.S. v. Whiting, 563 U.S. 582, 594 (2011).

103. *Id.*

104. Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 135 (2003) ("Title I of the DMCA goes beyond traditional copyright approaches in order to address the threat of unauthorized reproduction and distribution of copyrighted works in the digital age."). See generally David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 686 (2000) (noting the DMCA's main provision is not copyright infringement).

105. See *Caminetti v. United States*, 242 U.S. 470, 490 (1917) ("[T]he name given to an act by way of designation or description . . . cannot change the plain import of its words.").

106. World Intellectual Property Organization Copyright Treaty art. 11, Apr. 12, 1997, S. TREATY DOC. NO. 105-17, 2186 U.N.T.S. 38542.

107. Burk, *supra* note 16, at 1103.

108. See *id.*

109. See *id.*; see also Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 409–15 (1997) (noting that language similar to the DMCA's anti-circumvention provision was rejected at the WIPO's diplomatic conference because other countries thought that either the anti-circumvention provision was unnecessary or that the language was too broad).

110. See H.R. REP. NO. 105-551, pt. 2, at 24–25 (1998).

the House Committee on Commerce.¹¹¹ The Commerce Committee believed that H.R. 2281 concerned “much more than intellectual property.”¹¹² During the committee process, the Commerce Committee adopted an amendment that moved the anti-circumvention provision out of Title 17—the copyright law portion of the United States Code—and made it a freestanding provision of law.¹¹³ The committee reasoned that the anti-circumvention provision should not be in Title 17 because those “provision[s] have little, if anything, to do with copyright law.”¹¹⁴ Indeed, Congress asserted its constitutional ability to enact the DMCA came from the commerce clause, rather than the copyright clause.¹¹⁵

Further, the Commerce Committee noted the anti-circumvention provision was a sharp deviation from how Congress had historically fulfilled its constitutional objective of promoting “the Progress of Science and the useful Arts.”¹¹⁶ Historically, federal copyright law regulated copyrighted information, not the technology that disseminated the information.¹¹⁷ The Commerce Committee observed that the Copyright Act is technologically neutral, meaning certain actions are prohibited—but not the commerce in information technology, i.e., the devices by which the information is disseminated.¹¹⁸

The Commerce Committee agreed with a group of what it described as “distinguished copyright law professors” who wrote to the Committee expressing their concerns about the bill.¹¹⁹ The professors warned that while Congress may ultimately codify the anti-circumvention provision in Title 17, the liability that this provision creates is a “separate and independent” action from copyright infringement.¹²⁰ The professors also warned against what they described as “paracopyright,”¹²¹ which creates liability for one who attempts to circumvent a technological measure that protects a copyrighted work.¹²² The professors noted that the conduct the anti-circumvention provisions prohibit have “traditionally . . . fallen outside the regulatory sphere of intellectual property law.”¹²³ The Commerce Committee agreed with the professors’ claims but acknowledged that there must be some law that

111. H.R. REP. NO. 105-551, pt. 1, at 1 (1998) (Judiciary); H.R. REP. NO. 105-551, pt. 2, at 21 (commerce).

112. H.R. REP. NO. 105-551, pt. 2, at 22.

113. *Id.* at 23.

114. *Id.* at 24.

115. *Id.* at 35.

116. U.S. CONST. art. I, § 8, cl. 8.

117. H.R. REP. NO. 105-551, pt. 2, at 24.

118. *Id.* at 24.

119. *Id.* at 24–25.

120. *Id.* at 24.

121. *Id.*

122. Nimmer, *supra* note 104, at 727 nn.292–94.

123. H.R. REP. NO. 105-551, pt. 2, at 25.

protects copyright owners from the unique threat that the digital environment poses.¹²⁴

For these reasons, the House Committee on Commerce voted on and adopted an amendment to H.R. 2281 that made the anti-circumvention portions free-standing sections of law, rather than a part of Title 17.¹²⁵ Although the Senate ultimately changed the House version of the bill, this legislative history shows that Congress did not intend the DMCA to be a traditional copyright law which could expressly preempt state laws. Thus, the DMCA cannot preempt state law. Because Congress did not intend the DMCA to be a new copyright law, the Copyright Preemption Statute's express preemption powers do not apply. Therefore, a state's right-to-repair law would be valid.

C. *The Copyright Preemption Statute's Preemptive Effect*

The Copyright Preemption Statute preempts all state and common law causes of action which grant the same legal rights as those granted by the Copyright Act.¹²⁶

1. Subject Matter and General Scope Requirement

The Copyright Preemption Statute preempts a state claim if the state claim: (1) falls within the scope of copyright subject matter, and (2) grants rights "equivalent to any of the exclusive rights within the general scope of copyright."¹²⁷ Courts generally refer to these two elements as the Subject Matter Requirement and the General Scope Requirement, respectively.¹²⁸

First, courts broadly interpret the Subject Matter Requirement to include works that contain non-copyrightable materials.¹²⁹ For example, in 1983, the Second Circuit held in *Harper & Row* that President Gerald Ford's memoirs, which contained non-copyrightable facts, met the subject matter requirement.¹³⁰ In that case, a magazine acquired a copy of President Ford's manuscript, and the magazine published information about Ford's public and political life.¹³¹ The court reasoned that while the information published was non-copyrightable, the memoir was copyrightable. Therefore, the memoir met the Subject Matter Requirement.¹³² If it did not meet the Subject Matter Requirement,

124. *Id.*

125. *Id.*

126. 17 U.S.C. § 301 (2012).

127. *Id.*; *Ryan v. Editions Ltd. W.*, 786 F.3d 754, 760 (9th Cir. 2015); *accord* *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424, 429 (2d Cir. 2012); *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 453 (6th Cir. 2001).

128. *See Forest Park Pictures*, 683 F.3d at 429–30.

129. *Briarpatch Ltd. v. Phx. Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004).

130. *Harper & Row, Publishers, Inc. v. Nat'l Enters.*, 723 F.2d 195, 200 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985).

131. *See id.* at 198–99.

132. *Id.* at 200.

the court feared states would be able to enact their own copyright protections for materials that contained both copyrightable and non-copyrightable material, which would directly oppose one of the Act's central goals.¹³³ Thus, a work consisting of non-copyrightable material can still meet this requirement if the work broadly fits into a copyrightable category.¹³⁴

Second, a state claim is beyond the General Scope Requirement if it is “qualitatively different” from a right that the Copyright Act protects.¹³⁵ Thus, a state cause of action that is qualitatively different from a right protected by Title 17 is not preempted, and thus valid. There are two ways courts examine whether a state claim is qualitatively different. First, courts consider the rights the plaintiff is seeking to protect.¹³⁶ Second, courts determine if the state cause of action contains additional elements beyond what the Copyright Act requires.¹³⁷

It is well established that software can be copyrighted.¹³⁸ Thus, right-to-repair laws meet the first prong of this test because the work in question is software. Regardless, the second prong of the test—the General Scope Requirement—is not met. The Copyright Preemption Statute would not preempt a state's right-to-repair law because the plaintiff would seek to protect rights that are qualitatively different from what the Copyright Act protects. Likewise, right-to-repair laws require additional elements beyond what the Copyright Act requires.

Right-to-repair laws are designed so that the non-copyright owner institutes the lawsuit. For example, some bills have a provision that requires the independent repair shop to inform the manufacturer in writing that the independent repair shop believes the manufacturer has failed to comply with the law, then allow thirty-days for the manufacturer to cure the lack of compliance before bringing suit.¹³⁹ But, other bills require the state attorney general to institute a civil suit to enforce the law.¹⁴⁰ No matter the setup the state chooses, the law presupposes that the party instituting the action is either the attorney general or an independent repair shop—not the copyright holder.

Therefore, the right the plaintiff would seek to protect would be enforcement of the right-to-repair law itself. This throws a wrench in the Copyright Act preemption analysis because there is no copyright claim, so no federal law exists to analyze. In this scenario, plaintiffs

133. *Id.*

134. *Briarpatch*, 373 F.3d at 305.

135. *Ryan v. Editions Ltd. W.*, 786 F.3d 754, 760 (9th Cir. 2015).

136. *Briarpatch*, 373 F.3d at 306.

137. *Ryan*, 786 F.3d at 760.

138. 1 NIMMER & NIMMER, *supra* note 21, § 2A.10(B).

139. *See, e.g.*, S.B. 96, 119th Gen. Assemb., Reg. Sess. § 9 (Mass. 2017); H.B. 143, 119th Gen. Assemb., Reg. Sess. § 9 (Mass. 2017); H.B. 199, 64th Leg., Reg. Sess. § 1 (Wyo. 2017).

140. *See, e.g.*, Leg. B. 67, 150th Leg., Reg. Sess. § 8 (Neb. 2017); H.B. 2279, 65th Leg., Reg. Sess. § 6 (Wash. 2018).

would protect their ability to access repair parts and information via a state cause of action—something totally divorced from federal copyright law. Thus, the Copyright Preemption Statute's preemptive power would not enter the analysis.

2. The Extra Element Requirement

Another way courts determine that a state cause of action is qualitatively different is if it contains additional elements beyond that which the Copyright Act requires.¹⁴¹ The courts take a restrictive view of what constitutes "extra elements," and thus a qualitatively different claim.¹⁴² To be a qualitatively different claim, the additional element must change the cause of action's nature and not just its scope.¹⁴³ For example, requiring a plaintiff to also show breach of fiduciary duty would change the action's nature.¹⁴⁴ However, adding a scienter requirement would not make the claim qualitatively different because that only alters the cause of action's scope and not its nature.¹⁴⁵

In one of the first cases to consider whether the Copyright Preemption Statute preempts a state claim, the Eighth Circuit held that a contract claim was different from a copyright claim.¹⁴⁶ In that case, Computer Associates created software and licensed it to National Car Rental.¹⁴⁷ The license agreement provided that National Car Rental could only use the software to process its own data.¹⁴⁸ However, Computer Associates learned that National Car Rental was using the software to process data of third parties.¹⁴⁹ Computer Associates sued, claiming that National Car Rental breached the license agreement and infringed on Computer Associates' copyright.¹⁵⁰

The Eighth Circuit rejected National Car Rental's argument that the breach of contract claim protected a right equivalent to Computer Associates' copyright claim, and therefore is preempted by the Copyright Preemption Statute.¹⁵¹ The court explained the addition of an element beyond "the act[] of reproduction, performance, distribution or display" causes the claim to fall outside of the general scope of copyright.¹⁵² Further, the court could not find any precedent suggesting that breaching a contract constituted copyright infringement.

141. *Ryan*, 786 F.3d at 760; *Briarpatch*, 373 F.3d at 306.

142. *Briarpatch*, 373 F.3d at 306.

143. *Comput. Ass'n Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 717 (2d Cir. 1992).

144. *Briarpatch*, 373 F.3d at 306.

145. *Comput. Ass'n Int'l*, 982 F.2d at 717; *Briarpatch*, 373 F.3d at 306.

146. *Nat'l Car Rental Sys., Inc. v. Comput. Ass'n Int'l, Inc.*, 991 F.2d 426, 430–31 (8th Cir. 1993).

147. *Id.* at 427.

148. *Id.*

149. *Id.* at 428.

150. *Id.*

151. *See id.* at 430–31.

152. *Id.* at 431.

ment.¹⁵³ Therefore, because the breach of contract claim is outside the general scope of copyright, the claim could not be preempted.¹⁵⁴

Thus, a state law that incorporates elements beyond reproduction, or the like, is not equivalent, so the state law is not preempted.¹⁵⁵ Determining if right-to-repair laws have additional elements beyond those of the DMCA requires an understanding of the elements of the DMCA.

a. *The DMCA's Elements*

Various federal courts of appeals have reached different conclusions regarding the elements of the DMCA.¹⁵⁶ The two interpretations of the law are best exemplified by the Federal Circuit in *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*,¹⁵⁷ and the Ninth Circuit in *MDY Industries, LLC v. Blizzard Entertainment, Inc.*¹⁵⁸ In 2004, the Federal Circuit in *Chamberlain* adopted a narrow reading of the DMCA. But six years later, the Ninth Circuit in *Blizzard* adopted a much broader reading of the statute. The elements a plaintiff is required to show, therefore, differ depending on jurisdiction.

In *Chamberlain*, the Court of Appeals for the Federal Circuit held that adopting the plain meaning of the DMCA would lead to an “absurd and disastrous” result.¹⁵⁹ Therefore, the court reasoned there must be a “reasonable relationship” between the circumvention and the copyright infringement.¹⁶⁰ The *Chamberlain* court, in effect, engraved into the DMCA a requirement that a plaintiff must prove that the defendant’s action infringed a valid copyright.¹⁶¹ The court established this requirement because it had concerns regarding the policy implications without such a requirement.¹⁶²

153. *See id.* at 431–32. Other Federal Courts of Appeals have followed this same holding. *Taquino v. Teledyne Monarch Rubber*, 893 F.2d 1488, 1501 (5th Cir. 1990) (“This action for breach of contract involves an element in addition to mere reproduction, distribution or display: the contract promise made by [appellants], therefore, it is not preempted.”); *accord Acorn Structures, Inc. v. Swantz*, 846 F.2d 923, 926 (4th Cir. 1988); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

154. *See Nat’l Car Rental Sys.*, 991 F.2d at 431.

155. *R.W. Beck, Inc. v. E3 Consulting, LLC*, 577 F.3d 1133, 1147 (10th Cir. 2009).

156. *Compare MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928 (9th Cir. 2010) (construing narrowly the DMCA), *with Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178 (Fed. Cir. 2004) (construing broadly the DMCA). *See generally* Theresa M. Troupson, Note, *Yes, It’s Illegal to Cheat a Paywall: Access Rights and the DMCA’s Anticircumvention Provision*, 90 N.Y.U. L. REV. 325, 336–49 (2015) (explaining the two interpretations).

157. *Chamberlain*, 381 F.3d at 1178.

158. *Blizzard*, 629 F.3d at 928.

159. *Chamberlain*, 381 F.3d at 1201.

160. *Id.* at 1202.

161. *Id.* at 1203.

162. *See* Troupson, *supra* note 156, at 342.

Chamberlain Group, Inc. (“Chamberlain”) makes automatic garage door openers and remotes.¹⁶³ Traditional garage door openers use a unique but fixed binary-coded signal to open the door.¹⁶⁴ However, Chamberlain developed a garage door opener that used a code that changed each time the owner opened and closed their door, which it called a “rolling code.”¹⁶⁵ Chamberlain copyrighted this rolling code technology.¹⁶⁶ Chamberlain claimed its rolling code technology prevents a burglar from using a “code grabber” to learn a homeowner’s unique code, then replay that code when the burglar has safe and easy access to the home.¹⁶⁷

Skylink Technologies, Inc. (“Skylink”) was a universal garage door opener manufacturer.¹⁶⁸ Despite Chamberlain’s rolling code technology, Skylink developed a universal remote that opened garage doors allegedly using Chamberlain’s rolling code technology.¹⁶⁹ However, Skylink’s universal remote did not use Chamberlain’s rolling code technology; instead, it used the traditional binary signal.¹⁷⁰ Skylink took advantage of a resynchronization flaw in the rolling code technology, which allowed a traditional binary signal to work.¹⁷¹

By exploiting this flaw, Chamberlain claimed Skylink violated the anti-circumvention provision of the DMCA.¹⁷² It is important to note that Chamberlain never claimed or asserted that Skylink had infringed on Chamberlain’s copyrighted rolling code technology.¹⁷³ Skylink moved for summary judgment, which the district court granted,¹⁷⁴ and Chamberlain appealed.

The Federal Circuit affirmed the district court’s conclusion that Skylink did not violate the DMCA.¹⁷⁵ The court began its analysis by rejecting Chamberlain’s claim that the DMCA established new property rights; instead, the court held the DMCA merely establishes a new cause of action for which a defendant can be liable, and it provides a new mechanism for copyright holders to secure their copyrights.¹⁷⁶

Chamberlain argued that the court should read the DMCA as Congress wrote it—that there is no connection between circumvention

163. *Chamberlain*, 381 F.3d at 1183.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 1183–84.

168. *Id.* at 1184.

169. *Id.*

170. *Id.* at 1184–85.

171. *Id.*

172. *Id.* at 1185.

173. *Id.*

174. *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 292 F. Supp. 2d 1040, 1041 (N.D. Ill. 2003).

175. *Chamberlain*, 381 F.3d at 1204.

176. *Id.* at 1192–94.

and copyright access.¹⁷⁷ Chamberlain pointed to the Southern District of New York’s ruling in *Reimerdes* for the proposition that anti-circumvention can occur with or without copyright infringement.¹⁷⁸ The court rejected this contention stating that there was a “significant difference[]” between the action of the defendants in *Reimerdes* and *Skylink*.¹⁷⁹ Unlike the *Reimerdes* defendants, whose product was capable of only one use—infringing on copyrighted software—*Skylink*’s product had legitimate uses.¹⁸⁰

The court also found fault with Chamberlain’s broad interpretation of the DMCA.¹⁸¹ The court noted under Chamberlain’s broad construction, a defendant could be liable for circumvention, even if the defendant’s access is granted to the public under the Copyright Act.¹⁸² Such an interpretation, the court held, would be “irrational.”¹⁸³ In addition to finding fault with the practical effects of Chamberlain’s broad interpretation,¹⁸⁴ the court noted that Chamberlain’s interpretation would “flatly contradict” another provision of the DMCA.¹⁸⁵

Therefore, the *Chamberlain* court held that the DMCA requires a reasonable relationship between the circumvention and copyright infringement.¹⁸⁶ To prove a claim under the DMCA, a plaintiff must show:

- (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.¹⁸⁷

A plaintiff needs to only show one of the three sub-elements under element six to establish a *prima facie* claim.¹⁸⁸

177. *Id.* at 1197.

178. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 319 (S.D.N.Y. 2000), *aff’d sub nom.* *Universal City Studios, Inc. v. Corley*, 27 F.3d 429 (2d Cir. 2001).

179. *Chamberlain*, 381 F.3d at 1198.

180. *Id.*

181. *Id.* at 1200.

182. *Id.*

183. *Id.*

184. The court said under Chamberlain’s construction of the law, a burglar who gains access to a home that contains books, music, or art that was copyrighted by disabling an alarm, violates the DMCA. The court said the remedy to “this type of behavior lie[s] in tort and criminal law, *not* in copyright law.” *Id.* at 1201.

185. *Id.* at 1200.

186. *Id.* at 1202.

187. *Id.* at 1203 (emphasis omitted).

188. *Id.*

The *Chamberlain* court made a policy decision when it held that circumvention, in and of itself, does not violate the DMCA and instead required there to also be a copyright infringement. The *Chamberlain* court is not the only court to hold that there must be a link between the circumvention and copyright infringement.¹⁸⁹ The Federal Circuit has since reaffirmed its decision in *Chamberlain*.¹⁹⁰ The Fourth Circuit has endorsed this interpretation,¹⁹¹ and other district courts have also followed this analysis.¹⁹² Alternatively, the Sixth Circuit used different reasoning to come to the same conclusion. In *Lexmark*, the Sixth Circuit held that the DMCA required a plaintiff to show that the defendant did something beyond mere circumvention.¹⁹³ A plaintiff must show that the defendant affected the copyrighted content.¹⁹⁴

On the other hand, in *MDY Industries, LLC v. Blizzard Entertainment, Inc.*,¹⁹⁵ the Ninth Circuit adopted a much broader reading of the statute than did the *Chamberlain* court. The *Blizzard* court adopted the plain-meaning of the DMCA and expressly rejected the *Chamberlain* court's reasonable relationship requirement.¹⁹⁶ The Ninth Circuit held that the DMCA's legislative history suggests that Congress sought to make the act of circumvention illegal, and it did not intend a reasonable relationship requirement.¹⁹⁷

Blizzard Entertainment is the creator of World of Warcraft ("WoW"), a popular online computer game.¹⁹⁸ The goal of WoW is to advance from level to level by battling monsters and participating in

189. See Troupson, *supra* note 156, at 328 (concluding the narrow interpretation approach is the more popular of the two approaches).

190. See *Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc.*, 421 F.3d 1307, 1318 (Fed. Cir. 2005).

191. *Chambers v. Amazon.com, Inc.*, 632 F. App'x 742, 744 (4th Cir. 2015) ("A copyright owner alleging a violation of the DMCA must prove that the circumvention of the technological measure either infringes or facilitates infringing a right protected by the Copyright Act.") (citing *Storage Tech. Corp.*, 421 F.3d at 1318) (internal quotations omitted).

192. *RealNetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913, 931–32 (N.D. Cal. 2009) ("The DMCA created new causes of action both for circumvention of access controls in ways that facilitate copyright infringement and for trafficking in circumvention devices that facilitate copyright infringement.") (citing *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1195 (Fed. Cir. 2004)); *AGFA Monotype Corp. v. Adobe Sys., Inc.*, 404 F. Supp. 2d 1030, 1034–35 (N.D. Ill. 2005) (applying the *Chamberlain* test).

193. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 549 (6th Cir. 2004).

194. *Id.*

195. *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928 (9th Cir. 2010).

196. *Id.* at 952.

197. *Id.* Further, the Ninth Circuit held that, even assuming the validity of the policy concerns that the *Chamberlain* court brought up, the court cannot override the statute's plain meaning and Congress's intent when enacting the statute. See *id.*

198. *Id.* at 935.

quests, while collecting weapons and in-game money.¹⁹⁹ This is a deeply time-intensive game—one in which players have spent millions of hours playing.²⁰⁰

Michael Donnelly, the sole member of MDY Industries, LLC (“MDY”) is a WoW player and software developer.²⁰¹ Donnelly developed a software program that simulates the early levels of WoW and allows a player to progress through those levels without having to actually play them.²⁰² Soon after developing this program, Donnelly started selling it to WoW players on MDY’s website.²⁰³ As a result of Donnelly’s software, as well as other similar types of software, Blizzard launched its own software that prevented players from using programs similar to Donnelly’s.²⁰⁴ Donnelly responded by updating his program to prevent Blizzard’s program from detecting when players used Donnelly’s program.²⁰⁵

Blizzard sent MDY Industries a cease-and-desist letter claiming that Donnelly and MDY had violated Blizzard’s copyrights.²⁰⁶ Donnelly responded by seeking a declaratory judgment stating that his program does not infringe on Blizzard’s copyright.²⁰⁷ Blizzard filed a counterclaim against Donnelly and MDY claiming they violated, among other things, the DMCA.²⁰⁸ The district court granted MDY’s partial summary judgment finding that it did not violate the DMCA.²⁰⁹

The Ninth Circuit vacated the district court’s ruling and held that MDY was liable under the DMCA.²¹⁰ The court began its analysis by determining the proper scope of the DMCA.²¹¹ The court held that the DMCA creates two new claims: one for anti-circumvention of a technological measure and one for trafficking anti-circumvention technologies.²¹² Importantly, the court used the statute’s plain meaning to interpret the DMCA to allow for a broader set of claims.²¹³ The

199. *Id.*

200. Kate Cox, *Nearly 6 Million Years of World of Warcraft Health for Players’ Brains*, KOTAKU, (Mar. 9, 2012, 9:30 PM), <https://kotaku.com/5891421/nearly-6-million-years-of-world-of-warcraft-healthy-for-players-brains> [<https://perma.cc/6V7R-9ULE>] (explaining that WoW players have combined to play almost six million years of WoW).

201. *Blizzard*, 629 F.3d at 934–35.

202. *Id.* at 935.

203. *Id.* at 936.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 937.

208. *Id.*

209. *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 616 F. Supp. 2d 958, 975 (D. Ariz. 2009), *vacated*, 629 F.3d 928 (9th Cir. 2010).

210. *Blizzard*, 629 F.3d at 957.

211. *Id.* at 943.

212. *Id.* at 944.

213. Troupson, *supra* note 156, at 340.

court reached this conclusion by holding that the anti-circumvention provision creates a “right distinct from copyright.”²¹⁴

The Ninth Circuit expressly rejected the *Chamberlain* court’s reasonable relationship requirement.²¹⁵ The Ninth Circuit held that the DMCA’s plain meaning and its legislative history indicate Congress intended to prevent non-copyright infringing circumvention.²¹⁶ Further, as the court noted, the policy concerns that the *Chamberlain* court addressed are better left for Congress to resolve—not the courts.²¹⁷

Therefore, unlike the *Chamberlain* court, the *Blizzard* court held that a defendant can be liable under the DMCA without infringing on the copyright that the copyright owner’s technology protects.²¹⁸ To prove a claim under the DMCA’s anti-circumvention provision, a plaintiff must show that the defendant: “(1) Traffics in (2) a technology or part thereof (3) that is primarily designed, produced, or marketed for, or has limited commercially significant use other than (4) circumventing a technological measure (5) that effectively controls access (6) to a copyrighted work.”²¹⁹ The court ruled that MDY was liable under the DMCA²²⁰ without finding that MDY had infringed on Blizzard’s copyrights.²²¹

The *Blizzard* court is not the only court to interpret the DMCA broadly. The Ninth Circuit has since reaffirmed its decision in *Blizzard*.²²² The Third²²³ and Fifth²²⁴ Circuits have also adopted this broad interpretation.

b. *Right-to-Repair Elements*

The Federal courts of appeals have outlined two different sets of elements that a plaintiff must show to assert a claim under the DMCA. However, there are additional elements that right-to-repair laws require when applying either test. Therefore, the Copyright Preemption Statute will not preempt right-to-repair legislation.

Right-to-repair laws encompass elements beyond that of the DMCA. The Ninth Circuit and Federal Circuit have developed differ-

214. *Blizzard*, 629 F.3d at 948.

215. *Id.* at 950.

216. *Id.*

217. *Id.*

218. *Id.* at 944.

219. *Id.* at 953.

220. *Id.*

221. *Id.* at 941–42.

222. *See* *Disney Enter., Inc. v. VidAngel, Inc.*, 869 F.3d 848 (9th Cir. 2017).

223. *See* *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 300 (3d Cir. 2011) (holding that a plaintiff can assert a claim under the DMCA that is separate from an infringement claim under the Copyright Act).

224. *See* *MGE UPS Sys. v. GE Consumer & Indus. Inc.*, 622 F.3d 361, 366 (5th Cir. 2010) (“Because § 1201(a)(1) is targeted at circumvention, it does not apply to the use of copyrighted works after the technological measure has been circumvented.”).

ent tests encompassing different elements to establish a cause of action under the DMCA. The Federal Circuit requires that a plaintiff show:

(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.²²⁵

Alternatively, the Ninth Circuit requires a plaintiff to show that a defendant: “(1) Traffics in (2) a technology or part thereof (3) that is primarily designed, produced, or marketed for, or has limited commercially significant use other than (4) circumventing a technological measure (5) that effectively controls access (6) to a copyrighted work.”²²⁶

The elements for a cause of action under a right-to-repair law are markedly different than the DMCA-required elements, no matter which test a jurisdiction applies. Right-to-repair laws require a plaintiff to show: (1) the manufacturer sold and used the device in the state; (2) the manufacturer did not make available to the owner of the device or an independent repairer (i) repair information, software, firmware, or similar items, (ii) repair parts, or (iii) repair tools; and (3) the owner or independent repairer notified the manufacturer of the manufacturer’s non-compliance with the law and gave it time to cure the non-compliance.²²⁷

Because right-to-repair laws contain additional elements, the DMCA does not preempt them. As stated above, federal law will not preempt a state law if the state law contains an extra element that changes the claim to a qualitatively different claim from a copyright claim.²²⁸ Courts will analyze a claim to identify core elements and determine if the claims are qualitatively different.²²⁹ The core element of a right-to-repair claim is the manufacturer’s disclosure of repair infor-

225. *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1203 (Fed. Cir. 2004).

226. *Blizzard*, 629 F.3d at 953.

227. *See, e.g.*, S.B. 96, 119th Gen. Assemb., Reg. Sess. (Mass. 2017); Leg. B. 67, 150th Leg., Reg. Sess. (Neb. 2017); H.B. 1733, 165th Leg., Gen. Assemb., Reg. Sess. (N.H. 2018); S.B. 180, 2018 Leg., 2017–2018 Sess. (Vt. 2018) (as introduced); H.B. 2279, 65th Leg., Reg. Sess. (Wash. 2018); H.B. 199, 64th Leg., Reg. Sess. (Wyo. 2017).

228. *Rosciszewski v. Arete Assocs., Inc.*, 1 F.3d 225, 230 (4th Cir. 1993).

229. *See* *Trandes Corp. v. Guy F. Arkinson Co.*, 996 F.2d 655, 660 (4th Cir. 1993) (“[B]reach of a duty of trust or confidentiality comprises the core of actions for trade secret misappropriation, and supplies the extra element.”) (quotations omitted) (citing *Comput. Ass’n Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992); *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1090 n.13 (9th Cir. 1989)).

mation.²³⁰ The core element of a claim under the DMCA is the circumvention of a technological measure that effectively controls access. These two core elements are qualitatively different.

Under a right-to-repair claim, failure of the manufacturer to provide the owner of a device with the necessary parts, tools, and software serves as the core element because this failure is the sole reason for the proposed enactment. States are directly responding to their citizens' complaints that they cannot efficiently fix their devices.²³¹ Moreover, this element is what gives right-to-repair laws their teeth, and it is the element that critics frequently cite as their main concern.²³²

By contrast, the DMCA's core element—circumvention of a technological measure that effectively controls access—is qualitatively different from the right-to-repair element. The DMCA's core element concerns the device's design and manufacturing process. Manufacturers must ensure that the device is protected with DRM. The DMCA's core requirement differs from the right-to-repair's element, which only comes into play once the device has hit the market and consumers have used the device long enough that they must repair it.

Therefore, the core elements of the DMCA and right-to-repair laws are qualitatively different, and the second element of right-to-repair laws creates an extra element. Thus, the DMCA would not preempt right-to-repair laws.

D. *Implied Preemption*

Although three different types of preemption exist, the Supreme Court has stated that each category is not distinct; they are species of each other.²³³ The Court has identified Congress's intent as a key in preemption analysis. All preemption cases are guided by "the purpose of Congress,"²³⁴ and a state law will only be preempted if "it is the clear and manifest purpose of Congress."²³⁵ In express preemption cases, courts focus on the plain language of the preemption statute, as that is the best evidence of Congress's intent.²³⁶ In implied preemption cases, courts must also look to Congress's intent to determine if

230. See Jason Koebler, *Apple Must Explain Why It Doesn't Want You to Fix Your Own iPhone, California Lawmaker Says*, VICE (Mar. 12, 2018, 11:42 AM), https://motherboard.vice.com/en_us/article/evmeya/apple-iphone-right-to-repair-california [<https://perma.cc/RBQ7-59J2>] (author of the California version explaining that without the California version consumers "can[no]t repair [their] own" devices).

231. See, e.g., S.B. 180, 2018 Leg., 2017–2018 Sess. § 1 (Vt. 2018) (House Proposal of Amendment); H.B. 2279, 65th Leg., Reg. Sess. § 6 (Wash. 2018).

232. See Koebler, *supra* note 230.

233. See *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990).

234. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

235. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (internal quotation omitted).

236. *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 594 (2011).

field or conflict preemption exists.²³⁷ Thus, Congress’s lack of intent to expressly preempt state law applies with equal force to show that Congress did not implicitly intend to preempt state law.

Congress has not implicitly preempted the field of copyright; thus, right-to-repair laws are not implicitly preempted. Field preemption does not apply because Congress does not regulate the entire field of copyright, leaving some room for the states. Conflict preemption does not apply because compliance with both right-to-repair laws and the DMCA is possible, and right-to-repair laws do not impede the DMCA’s objective.

First, the Supreme Court has suggested that Congress has not preempted the entire copyright field. In 2015, by denying a petition for certiorari, the Court tacitly agreed with the Ninth Circuit’s determination that Congress has not preempted the copyright field.²³⁸ As the Ninth Circuit explained, “Congress did not, however, preempt the field when it enacted the Copyright Act.”²³⁹

Further, the Supreme Court explicitly held that Congress did not preempt the field when Congress enacted the Copyright Act’s preceding version. In *Goldstein v. California*, the Court reasoned that when the states entered the Union, they retained the sovereign power they possessed prior to joining the Union unless the Constitution exclusively gave a power to the federal government or expressly took away a power from the states.²⁴⁰ The Court also noted that when states entered the Union, many states already had their own copyright laws.²⁴¹ Further, the Copyright Clause of the Constitution did not give the federal government exclusive control over copyrights.²⁴² Therefore, “the States have not relinquished all power to grant to authors ‘the exclusive Right to their respective Writings.’”²⁴³ Thus, Congress has not preempted the field of copyright law.

Subsequently, the Supreme Court, once again, emphasized that the Copyright Clause of the Constitution does not prevent the states from enacting their own copyright laws.²⁴⁴ The Court determined that so long as a state law offers limited protections and those protections do not impermissibly interfere with the federal scheme, then the state’s law is valid.²⁴⁵ The Court also suggested that if the state law is limited to goals beyond Congress’s contemplation in the federal scheme, then

237. *Arizona v. United States*, 567 U.S. 387, 399–400 (2012).

238. *Ryan v. Editions Ltd. W., Inc.*, 786 F.3d 754, 760 (9th Cir.), *cert. denied*, 136 S. Ct. 267 (2015).

239. *Id.*

240. *Goldstein v. California*, 412 U.S. 546, 553 (1973).

241. *Id.* at 557.

242. *Id.* at 558.

243. *Id.* at 560.

244. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 165 (1989).

245. *Id.*

the state law is valid.²⁴⁶ Therefore, even if a court considered right-to-repair laws to be copyright laws, they would not be field preempted.

Further, when enacting the DMCA, Congress aimed to prevent piracy via the internet²⁴⁷ and retain incentives for the creation of new works.²⁴⁸ Right-to-repair laws do not interfere with this scheme because the same incentives still exist to create new works. Plus, Congress did not likely contemplate that the DMCA would prevent consumers from repairing their devices because Congress was more concerned that the law could be used to stop new products from reaching consumers.²⁴⁹ Right-to-repair laws, on the other hand, expressly deal with consumers' ability to repair their devices.

Thus, right-to-repair laws will not be field preempted because states still have the power to regulate some areas of copyright law. Further, these laws are narrow enough so as not to interfere with the federal scheme, and they only legislate in areas beyond Congress's contemplation.

Second, assuming that right-to-repair laws are copyright laws, conflict preemption would still not apply. When compliance with both the state and federal law is physically impossible, or when the state law is an obstacle to the federal objective, the federal law preempts state law. In *Florida Lime*, the Supreme Court gave an example of when compliance with both state and federal law is impossible.²⁵⁰ If a federal law only allowed fruit to be picked when its oil content was more than 7% and state law did not allow the same fruit to be picked if its oil content was 8% or less, then compliance with both is impossible.²⁵¹ Thus, based on this example, when the Court says compliance must be physically impossible, it means just that—*not possible*.²⁵²

A device manufacturer can provide repair parts, tools, and software to the owner while also complying with the requirements of the DMCA. Merely providing repair parts, tools, and software to device owners will not preclude manufacturers from asserting a claim against those who infringe on their copyrights because right-to-repair laws do not take away the ability to assert DMCA claims. A manufacturer, complying with right-to-repair requirements, could still meet all the elements for a claim under the DMCA, applying either the *Chamber-*

246. See *id.*

247. See H.R. REP. NO. 105-551, pt. 1, at 10 (1998).

248. Michael H. Wolk, Note, *The iPhone Jailbreaking Exemption and the Issue of Openness*, 19 CORNELL J.L. & PUB. POL'Y 795, 827 (2010).

249. Cf. 144 CONG. REC. S4890 (daily ed. May 14, 1998) (statement of Sen. Ashcroft) ("If history is a guide, however, someone may try to use this bill as a basis for initiating litigation to stop legitimate new products from coming to market.")

250. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

251. *Id.* at 143.

252. See *United States v. Denver*, 916 F. Supp. 1058, 1062 (D. Colo.) (holding that it is physically impossible to comply with both an EPA order requiring the clean-up of a hazardous waste site and a city's cease and desist order prohibiting the same clean-up), *aff'd*, 100 F.3d 1509 (10th Cir. 1996).

lain²⁵³ or the *Blizzard*²⁵⁴ test. The element that appears on its face to be the most difficult to meet would be the effectively-controls-access element of both tests because a manufacture is required to give diagnostic software updates,²⁵⁵ which arguably prevents a manufacturer from controlling access. However, plaintiffs could still meet this element because right-to-repair laws only require *diagnostic* software, not the underlying software that runs the device.²⁵⁶ And, any attempt to control access to the underlying software, even ineffective attempts, meet this element.²⁵⁷

Even if compliance with both state and federal law is possible, conflict preemption still exists if the state law provides an obstacle to the federal objective.²⁵⁸ When Congress enacted the DMCA, its objective was to ensure that digital copyright holders have the same protections as traditional copyright holders.²⁵⁹ Congress considered that the new technology of the digital age put copyrighted materials at risk and thus provided new protections for copyright holders to create in this new environment.²⁶⁰

Right-to-repair laws do not affect the DMCA's objective because Congress and the states have two different policy objectives that do not conflict with each other. Congress seeks to provide copyright protections in the digital age, while states seek to protect consumers from unfair trade practices.²⁶¹ By allowing consumers to repair their own devices, states are not altering the protections Congress afforded to digital copyright holders. Thus, federal law does not preempt right-to-repair laws.

V. POLICY

States should also consider implementing right-to-repair laws for three public policy reasons. First, it is significantly cheaper for consumers to fix their devices themselves or via an independent repairer. Second, by repairing broken devices and thus possessing the devices for longer periods, consumers will reduce electronic waste. Finally,

253. *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1203 (Fed. Cir. 2004).

254. *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 953 (9th Cir. 2010).

255. *See supra* note 53 and accompanying text.

256. *Id.*

257. *See Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 318 (S.D.N.Y. 2000), *aff'd sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

258. *See Arizona v. United States*, 567 U.S. 387, 399–400 (2012).

259. *See* Noelle S. A. Green, Comment, *A Tale of Three EULAs: Why Some End User Licenses Agreement Should Be Preempted by the Anticircumvention Provisions of the Digital Millennium Copyright Act of 1998*, 57 *How. L.J.* 701, 722 (2014).

260. S. REP. NO. 105–90, at 2 (1998); *see also* H.R. REP. NO. 105-551, pt. 1 at 9 (1998) (“With this evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted works.”).

261. *See, e.g.*, H.B. 2279, 65th Leg., Reg. Sess. § 6 (Wash. 2018).

right-to-repair laws comport with Congress's same policy goal as the DMCA.

First, self-repair of broken devices is significantly less expensive than repair at an authorized repair shop. For example, as the Wall Street Journal recently noted, fixing a broken part of a television can cost as little as \$12.²⁶² However, getting the television fixed by an authorized repairer would cost, at a minimum, \$215—almost as much as a new television.²⁶³ Also, consumers encounter time and geographic constraints associated with authorized repair shops. Authorized repair shops do not exist in rural areas, so consumers there are forced to drive considerable distances to get their devices fixed.²⁶⁴ Authorized repair shops may also have long wait times, meaning that consumers would be unable to fix their devices for days or weeks.²⁶⁵ Right-to-repair laws allow consumers to fix their devices at nearby independent shops for reasonable prices in a timely manner.

Second, when consumers are unable to get their devices fixed, they often throw them out and buy new ones.²⁶⁶ Old or broken electronic devices are known as electronic waste. The amount of electronic waste is increasing rapidly, and “is now the nation’s fastest growing category of solid waste.”²⁶⁷ In 2009, Americans threw out 141 million phones, or about 350,000 phones per day.²⁶⁸ Once the devices are thrown out, harmful materials, such as lead and cadmium, can end up in soil,

262. Geoffrey A. Fowler, *We Need the Right to Repair Our Gadgets*, WALL ST. J. (Sept. 8, 2015, 3:04 PM), <https://www.wsj.com/articles/we-need-the-right-to-repair-our-gadgets-1441737868> [<https://perma.cc/VL5Z-5R9T>] (explaining how having a broken television fixed by an authorized repair shop would cost almost as much as buying the TV new again, whereas self-repair costs as little as \$12).

263. *See id.*

264. *See Nebraska Hearing, supra* note 64, at 3 (statement of Sen. Lydia Brasch) (explaining that the Apple store nearest to her home is more than 80 miles away); *see also* Nicholas Deleon, *Right-to-Repair Laws could Make It Easier to Get a Phone or Laptop Fixed*, CONSUMER REP. (Mar. 29, 2018), <https://www.consumerreports.org/consumer-protection/right-to-repair-laws-could-make-it-easier-to-get-a-phone-or-laptop-fixed/> [<https://perma.cc/PM7J-CGA8>] (noting that North Dakota and South Dakota do not have any Apple stores, and that Alaska, Kansas, and Maine each have one).

265. *See Fair Servicing and Repair of Digital Electronic Products: Hearing on H.B. 2279 Before the Tech. & Econ. Dev. Comm.*, 65th Leg., Reg. Sess. (Wash. 2018) (statement of Brian Engelhard) (explaining that it would take more than a week to get an iPhone repaired at an authorized repair shop), <https://www.tvw.org/watch/?eventID=2018011062> [<https://perma.cc/HL36-6J6A>].

266. *Cf.* Jennifer Chen, Note, *The Efficiency and Management of the International Trade in Electronic Waste: Is There a Better Plan Than a Ban?*, 21 N.Y.U. ENVTL. L.J. 142, 143 (2014) (explaining how the turnover of electronic devices leads to electronic waste).

267. Heather L. Drayton, Note, *Economics of Electronic Waste Disposal Regulations*, 36 HOFSTRA L. REV. 149, 149 (2007).

268. Nathan Proctor, *Recharge Repair*, U.S. PUB. INST. RES. GRP. (Feb. 8, 2018), https://uspig.org/sites/pirg/files/reports/CAP_Recharge_Repair_Feb1_2018.pdf [<https://perma.cc/QLU7-WXFL>].

water, and food supplies.²⁶⁹ Allowing consumers to fix their own devices will reduce the number of broken devices that are thrown out because consumers will use the fixed devices for longer periods, which will decrease the number of disposed devices, therefore reducing environmental damage.

Finally, right-to-repair laws can co-exist with Congress's policy behind the DMCA. When Congress enacted the DMCA, its goal was to provide an environment where copyright holders had incentives to create new works.²⁷⁰ Right-to-repair laws do not infringe on this policy goal. Allowing consumers to repair their broken devices does not change the incentives to create new works that Congress developed. The incentives are still in place because copyright holders will still create new devices with the latest and most powerful technological computing power. The only difference is that consumers will be able to fix those new devices themselves.

VI. CONCLUSION

In October 2018, the Library of Congress issued new regulations that allow consumers to fix their electronic devices.²⁷¹ However, these new rules are not a long-term solution or one that ends the right-to-repair debate. First, the Library of Congress is required to review its circumvention rules once every three years,²⁷² and when reviewing the rules in the future, the Library of Congress could remove these new rules. Second, states have still considered right-to-repair laws even after the Library of Congress has issued rules that exempted a class of devices.²⁷³ So states will still likely push for these laws. Finally, the new rules do not go as far as right-to-repair legislation would have required because the new rules do not require device makers to release diagnostic tools.²⁷⁴ Indeed, right-to-repair advocates will continue to push state legislatures to pass right-to-repair laws.²⁷⁵

269. *Electronic Waste*, WORLD HEALTH ORG., <http://www.who.int/ceh/risks/ewaste/en/> (last visited Feb. 5, 2018) [<https://perma.cc/2AKA-CUC3>].

270. Wolk, *supra* note 248, at 827.

271. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 83 Fed. Reg. 54010, 54029–30 (Oct. 26, 2018) (to be codified at 37 C.F.R. pt. 201).

272. See 17 U.S.C. § 1201(a)(1)(C) (2012).

273. For example, Wyoming's bill was limited to farm equipment, and the Library of Congress had already exempted farming equipment. See *supra* note 62.

274. See Hamza Shaban, 'Right-To-Repair' Advocates Claim Major Victory in New Smartphone Copyright Exemption, WASH. POST (Oct. 26, 2018), https://www.washingtonpost.com/technology/2018/10/26/right-repair-advocates-claim-major-victory-new-smartphone-copyright-exemption/?utm_term=.35c7a1a37124 [<https://perma.cc/2HWE-K7RZ>].

275. Molly Wood, *That Time it Was Illegal to Fix Your Own Electronics . . . For Almost 20 Years*, MARKETPLACE, (Nov. 6, 2018, 5:09 AM), <https://www.marketplace.org/2018/11/05/tech/time-it-was-illegal-fix-your-own-electronics-almost-20-years> [<https://perma.cc/CX4T-EPRJ>].

Despite the claims made by the technology industry in statehouses across the country, federal copyright laws will not preempt right-to-repair laws. First, right-to-repair laws are not copyright laws, so the Copyright Preemption Statute does not apply. Second, Congress did not intend the DMCA to be a copyright law; thus, the Copyright Preemption Statute does not apply to the DMCA. Third, right-to-repair laws include additional elements compared to the DMCA; therefore, the DMCA does not implicitly preempt these laws. Finally, neither one of the implied preemption doctrines will preempt a state's right-to-repair law. Therefore, given the importance of right-to-repair laws, states should not hesitate to enact these laws