Originally published as part of a symposium on a paper by Margaret Jane Radin. To improve readability, this version uses a larger font than the original. Please refer to 54 CLEV. ST. L. REV. 205 (2006) (email achander@ucdavis.edu for copy) for citation purposes.

EXPORTING DMCA LOCKOUTS

ANUPAM CHANDER*

In her lead paper for a symposium in her honor, Margaret Jane Radin warns that our intellectual property laws are being rewritten in ways that neglect values embedded in neighboring legal subdisciplines, such as contract, competition, and free speech law. The effect has been to aggrandize the rights of intellectual property holders, at the expense of others in society. In my comment, I apply her elegant insight to an oft-neglected realm: our spirited efforts to export our ever-strengthening intellectual property law through bilateral trade agreements. Radin critiques the Digital Millennium Copyright Act's anti-circumvention provisions, which some companies have cleverly sought to deploy to bar competition in the after-market. Companies are seeking to exploit DMCA anti-circumvention to obtain monopolies, with varying success, in unexpected areas such as garage door openers, printer cartridges, and online multiplayer games.

I show how, through bilateral and regional free trade agreements, the United States is exporting the DMCA's controversial and strict anti-circumvention provisions. All *of the free trade agreements negotiated by the United States post-DMCA mandate the adoption of anti-circumvention provisions by our partners. A review of each of these agreements demonstrates that they carry the DMCA's cramped vision of permissible circumvention. They thus ignore what Radin describes as the legal milieu of intellectual property, in particular, competition law, foisting upon our trading partners rules that corporations may exploit to gain monopolies in the after-market for their products. This leads to the irony that measures to* free trade *might lead to a legal framework that* facilitates monopolies *in the after-market.*

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*Professor of Law, University of California, Davis. J.D. Yale Law Schoool; A.B. Harvard College. For research assistance, I thank Kathryn Lee and librarians Elisabeth McKechnie and Erin Murphy. I thank Jamie Love for an illuminating conversation on the subject.

After earning her position in the very highest echelon of legal scholarship by reinterpreting property law, Margaret Jane Radin has, over the last decade, guided us into the new terrains of intellectual property and cyberlaw. In "A Comment on Information Propertization and Its Legal Milieu," Radin continues the course, offering an important heuristic to think about the relationship of intellectual property to "neighboring" legal subdisciplines.

Radin warns us that our intellectual property laws are being rewritten in ways that neglect values embedded in neighboring legal subdisciplines, such as contract, competition, and free speech law.[1] The effect has been to aggrandize the rights of intellectual property holders, at the expense of others in society. In my comment on Radin's elegant paper, I will apply her insight to an oft-neglected realm: our spirited efforts to export our ever-strengthening intellectual property law through bilateral trade agreements. Radin critiques the Digital Millennium Copyright Act's anti-circumvention provisions, which some companies have cleverly sought to deploy to bar competition in the after-market.[2] As I will show, the controversial provisions at the heart of those efforts are being exported to foreign states by our free trade agreements. My underlying concern is that we may be exporting our all-too-narrow vision of intellectual property to many of our trading partners.[3]

Hard upon the Millennial turn, the United States embarked on an aggressive campaign to enter into bilateral and regional free trade

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[1]Margaret Jane Radin, *A Comment on Information Propertization and Its Legal Milieu*, 54 CLEV. ST. L. REV. 23 (2006). In a new paper, Madhavi Sunder observes that a plethora of values exist *within* intellectual property law, as well. Madhavi Sunder, *IP*^{3}, 59 STAN. L. REV. (forthcoming 2006) (on file with author); *see also* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996) (arguing that copyright law serves fundamentally to underwrite a democratic culture).

[2]Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522 (6th Cir. 2004); Chamberlain Group, Inc. v. Skylink Technologies, Inc., 381 F.3d 1178 (Fed. Cir. 2004).

[3]*Cf.* Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, *in* INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 1, 23 (Keith E. Maskus & Jerome H. Reichman eds., 2005) (expressing concern that we may be "[e]xporting a dysfunctional system to the rest of the world").

agreements.[4] After a period of relative quiet following free trade agreements with Israel (1985), Canada (1989), and Mexico (1994), we saw entry into force of free trade agreements in rapid succession: Jordan (December 2001), Chile (January 2004), Singapore (January 2004), Australia (January 2005), Morocco (January 2006), and Bahrain (January 2006).[5] The Central America-Dominican Republic-United States Free Trade Agreement (CAFTA) will go into full effect upon ratification by Costa Rica, and went into effect between the United States and El Salvador, Honduras, and Nicaragua earlier this year.[6] The United States is actively pursuing free trade agreements with Panama; the United Arab Emirates; the Andean countries of Colombia, Peru (signed but not ratified as of this writing), and Ecuador; the southern African countries of Botswana, Lesotho, Namibia, Swaziland, and South Africa; Oman (signed, but not ratified); and Thailand.[7] *All* of the free trade agreements negotiated post-DMCA mandate the adoption of anti-circumvention provisions by our free trade partners.

This effort to export the DMCA's anti-circumvention provisions should cause us concern. Efforts in the United States to apply the anti-circumvention provisions of the DMCA to protecting the after-markets for garage door openers[8] and printer cartridges[9] are rightly notorious. In such cases, a company with a popular product seeks to attract monopoly rents in follow-on goods by including software in its original product that makes unauthorized follow-on goods incompatible. As Radin warns, such cases demonstrate that the DMCA might not have adequately accounted for the concerns of the neighboring legal subdiscipline of competition. As I will show, foreign states will likely face similar struggles, difficulties which they might have avoided if policymakers had followed Radin's instruction

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[4]This reflects a global trend. The WTO reports that the number of regional trade agreements ("RTAs") notified over the last decade was greater than the number notified over the five preceding decades: "In the period 1948-1994, the GATT received 124 notifications of [Regional Trade Agreements] (relating to trade in goods), and since the creation of the WTO in 1995, over 130 additional arrangements covering trade in goods or services have been notified." World Trade Organization, *Facts and Figures*, *at* http://www.wto.org/english/ tratop_e/region_e/regfac_e.htm (last visited April 10, 2006).

[5]UNITED STATES TRADE REPRESENTATIVE, 2006 TRADE POLICY AGENDA AND 2005 ANNUAL REPORT 114-25 (2006), *available at* http://www.ustr.gov/Document_Library/ Reports_Publications/2006/2006_Trade_Policy_Agenda/Section_Index.html.

[6]United States Government, EXPORT.GOV, *at* http://www.export.gov/fta/complete/ CAFTA/ (undated).

[7]*Id*. I also discuss the draft agreement creating the Free Trade Area of the Americas below, though negotiations on that treaty have stalled. *See infra* notes 49-50 and accompanying text.

[8]*Chamberlain Group*, 381 F.3d 1178.

[9]*Lexmark Int'l*, 387 F.3d 572.

to heed the "legal milieu" of intellectual property. The problem becomes especially alarming because our poorer trading partners can ill afford the monopoly rents that anti-circumvention law might support. Furthermore, many of our trading partners in the developing world lack competition laws altogether or the resources to enforce them where they exist. There is a special irony that *free trade* might lead to a legal framework that *facilitates monopolies* in the after-market.

Equally troubling is the possibility that this legal export will carry with it what Radin has earlier described as "Efficacious Promulgated Superseding Entitlement Regimes" or "EPSERs."[10] As Radin points out, EPSERs often arise through private contracts that modify default public law. But they may also arise through technological self-help, such as "Technological Protection Measures" (or "Digital Rights Management"), which control uses of digital work through technology. As Radin writes, "DRMS's–if wide deployment of them does come to pass–will attempt to accomplish by machine fiat what was previously attempted by contract."[11]

Overly constricting FTAs also pose a danger for the United States. FTA obligations, it must be remembered, generally apply equally to the United States. Thus, it is possible that the United States could run afoul of its own FTAs. The FTAs are not term-limited, though they do permit withdrawal. Should we conclude in the future that the DMCA anti-circumvention rules are too constricting, we will have to renegotiate the FTA, flout the FTA, or conform to an uncongenial rule. Our FTA partners may often lack the internal economic incentive to seek to enforce the FTA's strict anti-circumvention terms (though they may take it as a license to reduce their own anti-circumvention excess), yet they may seek to enforce the FTA once partnered with interested multinational corporations engaged in rent-seeking.

My goal here is limited. I do not attack the anti-circumvention provisions of the DMCA as wholly misguided; the desire to prevent widespread piracy of copyrighted works is understandable. At the same time, I do not mean to suggest that the critique I offer here is the sum of the adverse consequences of that statute, including for speech and education.[12] My argument is limited to the threat posed by the export of the DMCA

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[10]Margaret Jane Radin, *Regime Change in Intellectual Property: Superseding the Law of the State with the "Law" of the Firm*, 1 U. OTTAWA LEGAL TECH. J. 173, 178 (2003-2004); Margaret Jane Radin, *Regulation by Contract, Regulation by Machine*, 160 J. INSTITUTIONAL & THEORETICAL ECON. 1, 5 (2004).

[11] *See* Radin, *Regulation by Contract, Regulation by Machine, supra* note 10, at 11.

[12]On copyright law's role in promoting democratic culture around the world, see Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217 (1998).

anti-circumvention rules, which do not explicitly guard against the anti-competitive use of those rules.

Part I briefly sketches the difficulties created domestically by a DMCA inattentive to concerns over competition. Part II describes how these legal problems are being exported to our trading partners through free trade agreements.

I. THE PROBLEM OF DMCA LOCKOUTS

Garage door openers and printer cartridges were certainly far from the minds of lawmakers when they passed the DMCA in 1998. Yet, in an environment in which silicon chips are embedded in more and more of our most ordinary products, potentially copyrightable material can be found in the most unexpected places.[13] This makes it possible to invoke the DMCA's anti-circumvention provisions in a wide variety of areas—including printer cartridges, garage door openers, and video game multiplayer interfaces—as the next section describes.

A. Deploying Anti-Circumvention to Bar After-Market Competition

Printer maker Lexmark designed its printers to accept only Lexmark-authorized toner cartridges. Static Control Components (SCC) manufactured a microchip that could enable non-Lexmark authorized toner cartridges to function in Lexmark printers. Lexmark brought suit, asserting, among other things, that SCC violated the DMCA by circumventing an access control protecting copyrighted software on the printer. Though Lexmark prevailed at trial, the Sixth Circuit rejected the claim, holding that Lexmark's copyrighted software on its printer was not in fact protected by an *effective* access control, since that software could be read directly from the printer memory itself.[14]

Also seeking to ward off competition, Chamberlain sued Skylink for marketing a universal garage door opener that could operate Chamberlain garage doors.[15] Chamberlain argued Skylink's garage door opener acted as a circumvention device, breaking through the electronic barriers in Chamberlain's system to reach its copyrighted software. The Federal Circuit ruled that because the homeowners who had purchased

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[13] *See*, *e.g.*, Jacqueline Lipton, *The Law of Unintended Consequences: The Digital Millennium Copyright Act and Interoperability,* 62 WASH. & LEE L. REV. 487, 512 (2005) (noting that "in the new millennium, . . . the distinction between physical goods and information products becomes increasingly blurred").

[14] *Lexmark Int'l*, 387 F.3d 522.

[15] *Chamberlain Group*, 381 F.3d 1178.

Chamberlain's garage door systems were authorized to access those systems, there could be no DMCA hacking violation.[16]

In both *Lexmark* and *Chamberlain*, the courts rebuffed efforts by companies to exploit DMCA anti-circumvention rules to bar competition. So should we not relax our concern about the DMCA's overreach? No, in both cases, a clever company can make some simple changes that might bring it within the protections of DMCA anti-circumvention. Lexmark, for example, can try to protect the software on its printer from being read by the attached computer, thus creating an effective access control, and thereby potentially qualifying for the DMCA prohibition. For its part, Chamberlain might notify its users that no third party garage door opener may access its garage door receiver, thereby potentially creating a DMCA circumvention when its copyrighted software is accessed by an unauthorized garage door opener. It is possible, of course, that the market would discipline such tying behavior (and therefore make it unwise for a profit-maximizing firm), but either imperfect competition or imperfect information might make this less likely.

Indeed, in his concurrence in *Lexmark*, Judge Merritt astutely foresaw the next move that companies like Lexmark might make, and he discouraged them from such clever manipulations. Judge Merritt worried that companies could "use the DMCA in conjunction with copyright law to create monopolies of manufactured goods for themselves just *by tweaking the facts of this case* . . . ."[17] Judge Merritt noted the possibility of abuse that certain interpretations of the DMCA might open: "A monopolist could enforce its will against a smaller rival simply because the potential cost of extended litigation and discovery where the burden of proof shifts to the defendant is itself a deterrent to innovation and competition."[18] Judge Merritt accordingly sought to limit the DMCA to cases that involved the "pirating of copyright-protected works such as movies, music, and computer programs."[19] However, the panel's opinion itself does not restrict the DMCA anti-circumvention provisions in this way.

In *Chamberlain*, too, the Federal Circuit explicitly recognized the competition issues at stake. It observed that accepting Chamberlain's "interpretation of the DMCA would . . . grant manufacturers broad exemptions from both the antitrust laws and the doctrine of copyright misuse."[20] But resolving the issue so as to avoid the anticompetitive effects

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[16] *Id.* at 1203.
[17] *Lexmark Int'l*, 387 F. 3d 551 (Merritt, J., concurring) (emphasis added).
[18] *Id*. at 552 (Merritt, J., concurring).
[19] *Id*.
[20] *Chamberlain Group*, 381 F.3d at 1193.

proved complicated, as the length and intricacy of the Federal Circuit's decision indicate.

Indeed, the dividing line between permissible and impermissible circumvention is difficult to draw. Consider *Davidson v. Jung*, in which Blizzard Entertainment, which permits players of its computer games to play against each other online using its own proprietary "Battle.net" system, brought suit against an open source alternative to its proprietary system.[21] A group of volunteers developed an alternative system known as bnetd, permitting users of Blizzard's games to play against each other even outside the Battle.net system. Blizzard sued the bnetd volunteers, alleging, among other things, violations of the DMCA anti-circumvention rules because its software permitted users to access protected portions of their games that permitted online gaming. Bnetd might have seemed an ideal candidate to claim the exception available for reverse engineering to achieve interoperability.[22] The system enabled individual game users to interoperate their games, indeed in a massive multi-player setting. Yet, the Eighth Circuit rejected the interoperability claim out of hand. Bnetd's central error was that it did not ensure that two users were not simultaneously using the same CD key, and therefore permitted illicit copies. *Davidson* demonstrates how precarious the interpretation of the DMCA anti-circumvention provisions can be.

B. The DMCA's Cramped Vision

The contortions required by the courts in the above cases might have been avoided if Congress had adopted Radin's suggestion to consider the broader legal milieu in which copyright rests.

A number of countries are taking steps to craft legal room for circumvention beyond that explicitly sanctioned in the DMCA—considering a variety of societal concerns beyond the desire to maximize the production of information. The European Union's Copyright Directive enumerates exemptions from anti-circumvention that go beyond those tolerated under the DMCA, including an exception for teaching and scientific research, and for non-commercial use by disabled persons. Under Norwegian law, if a technological measure "hinders . . . 'enjoyment within

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[21]Davidson & Assocs. v. Jung, 422 F.3d 630 (8th Cir. 2005). *See generally* Dan L. Burk, *Legal And Technical Standards In Digital Rights Management Technology*, 74 FORDHAM L. REV. 537, 564-65 (2005).

[22]The DMCA permits reverse engineering "for the sole purpose" of trying to achieve "interoperability" of computer programs through reverse engineering. *See* 17 U.S.C § 1201(f) (2006). Subsection (f)(4) defines interoperability as "the ability of computer programs to exchange information, and of such programs mutually to use the information which has been exchanged." *Id.*

the private sphere' of a lawfully acquired copy of a work, the user may circumvent the measure in order to 'enjoy' the work on . . . 'relevant playback equipment.'"[23] At the time of this writing, the French government seems to have retreated from a proposal to require Apple to share its encryption technology on songs purchased in iTunes to ensure interoperability with non-Apple music players.[24] Apple had denounced an early draft of the law as "state-sponsored piracy."[25]

After an extensive (two-hundred page) review of the anti-circumvention provisions in the U.S.-Australia FTA, an Australian parliamentary committee proposed to make explicit a wide variety of exceptions not set out in the text. The committee was responding to complaints from various constituents. The Australian Tax Office, for example, worried that the exception for "law enforcement" must be "sufficiently wide so as to cover civil (including tax-related) as well as criminal law administration and enforcement."[26] Another example demonstrates the often unexpected consequences of a too-strict anti-circumvention regime: the Australian Office of Film and Literature Classification worried that the exceptions did not specifically provide for circumvention that may be necessary for classifying films and other works to determine the appropriate audience for the work.[27] Responding to other suggestions, the Australian parliamentary committee recommended exceptions for "[m]aking back-up copies of computer programs; [t]he reproduction or adaptation of computer programs for interoperability between computer programs; . . . and [i]nteroperability between computer programs and data."[28]

The Australian parliamentary committee interpreted the anti-circumvention provisions to allow the non-commercial creation of tools to utilize certain permitted exceptions.[29] It also understood that the responsibility of creating such tools could not be limited to the permissible users of such tools alone. It cited for support a submission from the Intellectual Property Committee of the Business Law Section of the Law

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[23]Thomas Rieber-Mohn, *Norway: Overview*, EURO-COPYRIGHTS.ORG (last updated Mar. 12, 2006), *at* http://www.euro-copyrights.org/index/17/65.

[24]Greg Sandoval, *France Backs Down on iTunes DRM Stance*, CNET NEWS.COM (May 2, 2006), *at* http://news.com.com/France+backs+down+on+iTunes+DRM+stance/2100-1027_3-6067585.html.

[25]Elinor Mills, *Apple Calls French Law 'State-Sponsored Piracy,'* CNET News.com (Mar. 22, 2006), *at* http://news.com.com/Apple+calls+French+law+state-sponsored+piracy/2100 -1025_3-6052754.html.

[26]Australian House of Representatives Standing Committee on Legal and Constitutional Affairs, Review of technological protection measures exceptions (Feb. 2006).

[27]*Id*. at 55.

[28]*Id*. at 98.

[29]*Id*. at 88.

Council of Australia, which observed: "'Sound policy demands that a person's freedom to take advantage of an exception from liability should not be determined by whether that person actually has (or can employ) the technical human capital to circumvent.'"[30]

These examples demonstrate that states are beginning to recognize that a too-strict anti-circumvention policy might harm a variety of societal interests.

II. EXPORTING THE PROBLEM

A. Regime Shifting to Free Trade Agreements

Free trade agreements are an oft-unnoticed forum for the export of American law. They rarely demand significant changes in United States law, but often require significant changes in the law of our trading partner. Why should this be so? As the world's principal purchaser of internationally-traded goods and services,[31] the United States is one of the most important trading partners for many, and perhaps most, of the world's nations. While the United States already has an economy that is the one of the world's most open to goods from developing countries,[32] trading partners still seek to secure that openness against retrenchment and expand it even further. This eagerness to open the enormous United States market gives the United States significant leverage in its trade negotiations. The imbalance of bilateral negotiations is one of the principal arguments for multilateral talks through the GATT and later the World Trade Organization fora. Developing nations understand that, together, they represented a more formidable force—even against a united front of the United States, European Union, and Japan—than they would if they stood individually against any of the United States, European Union, or Japan.

Why the recent move by the United States to intellectual property law through bilateral and regional free trade agreements? As Larry Helfer points out, expanding intellectual property obligations imposed through the World Trade Organization does not seem politically feasible at the moment.

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[30] *Id*. at 88 (internal citation omitted).

[31] WORLD TRADE ORGANIZATION, INTERNATIONAL TRADE STATISTICS 2005 at 21, 23 (2005), http://www.wto.org/english/res_e/statis_e/its2005_e/ its05_overview_e.pdf (noting that United States imports represented 16.1% of all world trade merchandise imports, and 12.4% of all world trade services imports).

[32] United States Trade Representative, *U.S. is World's Most Open Economy to Developing Countries and Least Developed Countries*, Dec. 2005, http://www.ustr.gov/assets/Document_ Library/Fact_Sheets/2005/asset_upload_file264_8534.pdf.

Developing countries have strongly resisted the expansion of obligations under TRIPs, and have sought instead to undo ones already in place. Thus, the United States has "regime shifted" to more tractable fora.[33]

Developing nations can ill afford the deadweight losses and shift from domestic consumer surplus to foreign producer surplus entailed in the rise of monopolies. Clever manipulations of the anti-circumvention rules may help companies establish monopolies in the aftermarket for goods and services related to their product. In the developing world, once one gathers the significant resources to purchase a product produced in an advanced industrialized nation, one has to then consider how to maintain the product. Local companies often step in to service the original product, often using non-brand name supplies because of the lower price. This possibility may be significantly diminished with aggressive use of the anti-circumvention rules.

Strict FTAs may also narrow the possibilities for reverse engineering, as they declare circumvention of technological protections for copyrighted works criminal. The exception for reverse engineering tolerated in the FTAs is limited to reverse engineering for interoperability. Reverse engineering serves as an important vehicle for technology transfer, as engineers in the developing world disassemble the products of advanced industrial nations to learn about and service them.[34]

B. Examining the Free Trade Agreements

Each of the post-DMCA FTAs mandates anti-circumvention. The first such FTA, with Jordan, however, does so at a high level of generality, leaving room for each side to create appropriate exceptions. By the time that the United States came to negotiate the subsequent FTAs, such wiggle room was history. Some of these FTAs are in effect already (Chile, Singapore, Australia, Morocco, Bahrain, and CAFTA with respect to El Salvador, Honduras, and Nicaragua), while others are still either subject to ratification or implementation (Oman, Peru, and CAFTA with respect to Costa Rica, Dominican Republic, and Guatemala) or negotiation (the FTA with the Andean countries of Peru, Colombia, Ecuador, and potentially Bolivia). Even more ambitious yet is the agreement that would create a

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[33]Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1 (Winter 2004); Laurence R. Helfer, *Mediating Interactions in an Expanding International Intellectual Property Regime*, 36 CASE W. RES. J. INT'L L. 123 (Winter 2004) (describing regime shifting from traditional international intellectual property forum to alternative international fora).

[34]While patent law may bar certain acts of reverse engineering, it can only do so with respect to inventions that are still in patent in the country in which the reverse engineering occurs.

Free Trade Area of the Americas, but negotiations towards this end are currently stalled.[35] Each of these mandates lengthy anti-circumvention requirements, permitting exemptions to the anti-circumvention rule roughly as narrow as those in the DMCA. In other words, there is no hint of concerns for the possible anti-competitive effects of the DMCA. The only exception is the draft of the, currently stalled, Free Trade Area of the Americas, which permits each country to specify its own exemptions.

But are not the FTAs simply restating an obligation that our FTA partners had already undertaken before the World Intellectual Property Organization (WIPO) through its Copyright Treaty and the Performances and Phonograms Treaty?[36] (TRIPs, it should be noted, does not mandate anti-circumvention.) There are three reasons why the FTA anti-circumvention rules are meaningful in spite of the WIPO treaty obligations. First, by moving this obligation into the sanctions-enforced bilateral and regional free trade regime, the anti-circumvention provisions finally get teeth. Second, the WIPO treaties obligation with respect to anti-circumvention is quite minimal. The mandate on anti-circumvention in the WIPO Copyright Treaty—in full—is to "provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."[37] This general statement leaves room for exceptions, including ones designed to protect competition.[38] Finally, many of our trading partners had not ratified the WIPO Copyright Treaty until seemingly prompted to do so by our FTA.[39]

I now review the anti-circumvention provisions in each of the post-DMCA FTAs. I point out some salient differences, but there are others I do not note. In general, the minimal variance across the bulk of the ten

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[35]Mei-Ling Hopgood & Jack Chang, *Bush Is Bruised But Not Beaten in Talks*, MIAMI HERALD, Nov. 6, 2005, at 1A (reporting stalling of negotiations due to opposition from Brazil, Argentina, Venezuela, Uruguay and Paraguay).

[36]*See* WIPO Copyright Treaty art. 11, Dec. 20, 1996, 36 I.L.M. 65, http://www.wipo.int/documents/en/diplconf/distrib/pdf/94dc.pdf [hereinafter WCT]; WIPO Performances and Phonograms Treaty art. 18, Dec. 20, 1996, 36 I.L.M. 76, http://www.wipo.int/documents/en/diplconf/distrib/pdf/95dc.pdf [hereinafter WPPT].

[37]WCT, *supra* note 36, art. 11.

[38]Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERK. TECH. L. J. 519, 520 (1999) (noting that the DMCA "went far beyond treaty requirements").

[39]World Intellectual Property Organization, Treaties Database Notifications, *at* http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&search_what=N&treaty_id=16 (showing accessions by Singapore, Bahrain, and the Dominican Republic in 2005).

agreements demonstrates how little negotiation takes place in certain portions of these free trade agreements.

Jordan. The first FTA concluded by the United States after the enactment of the DMCA was with Jordan.[40] That treaty included a short clause mandating that Jordan prohibit civilly and criminally the trafficking of any circumvention device. That general requirement does not by itself pose the risk of the more elaborate and restrictive provisions of the DMCA. Banning the trafficking of anti-circumvention devices does not, without more, enable anticompetitive lockouts as long as it leaves room, for example, for Jordan to create exceptions to the anti-circumvention prohibition to recognize the anticompetitive danger. But could it not be argued that the general treaty requirement to ban anti-circumvention devices does not tolerate any exception? Not likely. Like all the other FTAs on this point, this anti-circumvention obligation applies to both Jordan and the United States. The United States, of course, has exceptions to the anti-circumvention rule, and there was no public suggestion that it was prepared to remove those exceptions during negotiations.

Chile. The U.S.-Chile FTA requires each party to prohibit, both civilly and criminally, any person who *knowingly* circumvents an access control or who traffics in a device that circumvents an access or copy control.[41] The knowledge requirement for circumventing an access control is new; it does not exist in the DMCA itself.[42] But the permissible enumerated exceptions generally track the DMCA. They are, with parenthetical citations to the analogous provision in the DMCA:

1. exceptions created to protect for three-year renewable periods non-infringing uses of particular classes of works or users determined pursuant to an administrative or legislative proceeding (DMCA §1201(c));
2. reverse engineering for interoperability (DMCA §1201(f));
3. encryption research (DMCA §1201(g));
4. protecting minors from inappropriate content (DMCA §1201(h));
5. testing security (DMCA §1201(j));
6. combating spyware (DMCA §1201(i));

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[40]Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S.-Jordan, Oct. 24, 2000, 41 I.L.M. 63, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Jordan/Section_Index.html.

[41]United States – Chile Free Trade Agreement art. 17.7, U.S.-Chile, July 16, 2003, State Dep. No. 04-35, 2003 WL 23856180, http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html. *Criminal* liability in the case of the trafficking may be restricted to "willful" conduct for "prohibited commercial purposes." *Id*.

[42]17 U.S.C. § 1201(a)(1)(A) (2006).

7. law enforcement (DMCA §1201(e)); and
8. acquisition decisions by libraries and educational institutions (DMCA §1201(d)).

Like the other subsequent FTAs, the U.S.-Chile FTA makes the renewable non-infringing classes rule-making process applicable to both access *and copy* controls, even though the DMCA only permits it for access controls. Also unlike the DMCA, the U.S.-Chile FTA permits a country to limit criminal liability when the defendant acted for a scientific or educational purpose. The need for such a provision startlingly demonstrates that the technological transfer and knowledge promotion promised by promoters of a robust intellectual property regime might be undermined by the very law exported by the United States.

Singapore. The U.S.-Singapore FTA limits exceptions to the eight described above in the U.S.-Chile FTA, with the minor variation that the renewable period for exceptions pursuant to a rule-making proceeding can be up to four years.[43] Unlike the DMCA, it limits liability for circumventing access controls to those who act knowingly or with reason to know. The agreement with Singapore will likely be used as the model for negotiations with the other East Asian tiger economies.

Australia. With the 14th largest economy in the world,[44] Australia represents a formidable negotiating partner, though it too agreed to the anti-circumvention provisions in its FTA with the United States. Its provisions track those of the Singapore agreement, with the exception that they seem to permit the rule-making exceptions to last longer than four years, even without renewal, as long as there is a rule-making proceeding to reconsider them every four years. It is unclear whether this distinction will be of any practical significance.

Morocco. The U.S.-Morocco FTA drops the knowledge requirement for liability for circumventing an access control, thus bringing the agreement closer to the DMCA requirements.[45] Otherwise, the U.S.-Morocco FTA closely resembles its U.S.-Australia predecessor, except for the rule-making proceeding exception, which follows the U.S.-Chile FTA in adopting the DMCA procedure (but does not make clear that the period is renewable upon additional showing).

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[43]United States-Singapore Free Trade Agreement, U.S.-Sing., May 6, 2003, http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html (last visited Mar. 31, 2006).

[44]WORLD BANK, WORLD DEVELOPMENT INDICATORS 22 (2005).

[45]United States-Morocco Free Trade Agreement, U.S.-Morocco, June 15, 2004, 44 I.L.M. 544, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/FInal_Text/Section_Index.html.

Bahrain. The anti-circumvention provisions in the U.S.-Bahrain FTA are almost identical to those in the U.S.-Morocco FTA, except for the rule-making proceeding exception, which follows the U.S.-Chile FTA in adopting the DMCA procedure.

CAFTA (in effect for certain countries).[46] CAFTA bears great similarity to the U.S.-Bahrain agreement, with the exception that it permits review for additional exemptions to take place every four years.

Oman (signed but not yet ratified). The anti-circumvention provisions in the draft U.S.-Oman FTA[47] are almost identical to those in the U.S.-Morocco FTA (but it does make clear that the period is renewable upon additional showing).

Peru (signed but not yet ratified). The draft agreement with Peru is intended to serve as the model for the FTA with the Andean countries of Peru, Colombia, Ecuador, and Bolivia. The U.S.-Peru Trade Promotion Agreement[48] tracks closely the U.S.-Morocco FTA, except that it follows the rule-making procedure described above for the U.S-Australia FTA.

FTAA (draft). The draft agreement creating the Free Trade Area of the Americas also mandates anti-circumvention, but does not limit exceptions to the anti-circumvention rule.[49] Indeed, the latest draft of this agreement recognizes each member state's right to define its own limitations: "In accordance with the preceding paragraph, technological measures shall not affect the exercise of the exceptions or limitations established in national legislation." The move to explicitly countenance national exceptions without limit runs exactly counter to demands from intellectual property interests to delimit the exceptions carefully, interests which point to the U.S.-Chile FTA as a model for such delimitation.[50]

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[46]Central America-Dominican Republic-United States Free Trade Agreement, U.S.-Cen. Am.-Dom. Rep., Aug. 5, 2004, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/ CAFTA/CAFTA-DR_Final_Texts/Section_Index.html.

[47]Agreement Between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area, U.S.-Oman, Jan. 19, 2006, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Oman_FTA/ Final_Text/Section_Index.html.

[48]United States-Peru Free Trade Agreement, U.S.-Peru, Dec. 7, 2005, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Draft_Texts/Section_Index.html.

[49]Free Trade Area of the Americas (Third Draft), Ch. XX, art. 22, *available at* http:// www.ftaa-alca.org/FTAADraft03/ChapterXX_e.asp.

[50]International Intellectual Property Alliance, Position Paper (Aug. 29, 2003) (proposing that "any exceptions to liability must be carefully narrowly crafted to preserve the adequacy and effectiveness of the anti-circumvention prohibitions (see Article 17.11.25 in the U.S.-Chile Free Trade Agreement on limitations on liability for internet service providers)"),

C. Summary: The Risks of Exporting Narrow Anti-Circumvention

Figure 1. Anti-Circumvention Mandates in United States Free Trade Agreements

Trading Partner	Anti-Circumvention Mandate	Exceptions
Israel (1985)[51]	No	n.a.
Canada (1989)	No	n.a.
Mexico (1994)	No	n.a.
Jordan (2001)	Yes	Broad
Chile (2004)	Yes	Limited
Singapore (2004)	Yes	Limited
Australia (2005)	Yes	Limited
Morocco (2006)	Yes	Limited
Bahrain (2006)	Yes	Limited
CAFTA (2006[52])	Yes	Limited
Oman(not ratified)	Yes	Limited
Peru (not ratified)	Yes	Limited
FTAA (draft)	Yes	Broad

Figure 1 summarizes the anti-circumvention provisions in the U.S. FTAs.

Contrast the intellectual property provisions FTA recently concluded between Australia and Thailand. That FTA seeks merely to prevent export of pirated and counterfeit goods and to cooperate to prevent such exports.[53] Australia did not seek extensive additional rights for intellectual property holders. We should ask whether when we seek to enlarge intellectual property rights abroad we are simply involved in rent-seeking.

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available at http://www.sice.oas.org/ftaa/miami/ABF/papers/piipa_e.asp. This Alliance represents "a coalition of six U.S. trade associations that collectively represent the U.S. copyright-based industries." *Id*.

[51]United States-Israel Free Trade Agreement, U.S.-Isr., Aug. 19, 1985, *available at* http://www.mac.doc.gov/tcc/data/commerce_html/TCC_Documents/IsraelFreeTrade.html.

[52]CAFTA is in effect between the United States, El Salvador, Honduras, and Nicaragua, but not as of this writing, with respect to the Dominican Republic and Guatemala. Costa Rica has not yet ratified the agreement. *See supra* note 6 and accompanying text.

[53]Government of Australia, Guide to the Provisions of the Australia- Thailand Free Trade Agreement, Chapter 13: Intellectual Property, art. 1302-05, (undated), *available at* http:// www.dfat.gov.au/trade/negotiations/aust-thai/aust-thai_fta_guide.pdf.

III. CONCLUSION

In its understandable zeal to deter widespread copying of digital films and music, the U.S. government has aggressively required the promulgation of extremely strict anti-circumvention provisions as one cost of entry into a free trade agreement. In the process, it has ignored the legal milieu of intellectual property, in particular, competition law, foisting upon our trading partners rules that may be exploited to permit corporations to gain monopolies in the after-market for their products.

This is only the beginning of the exercise. There is much more to review. Free trade agreements include a host of intellectual property provisions that go beyond TRIPs, including mandates on topics such as database protections, domain names, encrypted program-carrying satellite signals, rights management information, and geographical indications. In effect, we are rewriting the intellectual property laws of our trade partners. If we are to engage in such a task, we must be mindful to avoid a narrow focus on protecting intellectual products. Remembering Radin's advice, we must not neglect the legal milieu of intellectual property as we export that law.